Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH M. DeMAURO

Petitioner,

v.

ANNETTE B. DeMAURO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Amendment 14 to the U.S. Constitution affords a right to appellate review when the judgment appealed from confirms that the New Hampshire trial court failed and refused to follow an earlier New Hampshire Supreme Court ruling upholding the defendant's rights against self-incrimination under the Fifth Amendment.

2. Whether the failure and refusal of the New Hampshire trial court to follow the New Hampshire Supreme Court ruling in *DeMauro v. DeMauro*, 712 A.2d 623 (1998), which upheld the defendant's rights against self-incrimination under the Fifth Amendment was a denial of due process.

3. Whether the New Hampshire trial court imposed unconstitutional sanctions or punishment against the Petitioner for his proper assertion of his privilege against self-incrimination, which the New Hampshire Supreme Court effectively condoned by dismissal of his appeal.

4. Whether New Hampshire's newly enunciated rule allowing for dismissal of an appeal raising constitutional issues, based upon an appellant's contempt, or generally non-compliant conduct, is constitutionally defective as against due process and equal protection.

PARTIES TO THE PROCEEDINGS

Petitioner

Joseph M. DeMauro

Respondent

Annette B. DeMauro

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PETITION FOR WRIT OF CERTIORARI

Joseph M. DeMauro ("DeMauro") respectfully requests that a writ of certiorari issue to review the opinion of the New Hampshire Supreme Court ("NH Sup.Ct.") entered in this proceeding on April 5, 2002, upholding dismissal of the petitioner's appeal, in order to resolve the conflict between the State of New Hampshire's newly enunciated appellate forfeiture rule and (i) the petitioner's right against self-incrimination afforded under the Fifth Amendment of the United States Constitution and (ii) the petitioner's right to due process at trial pursuant to the Fourteenth Amendment. This Petition raises important constitutional issues, including whether the NH Sup.Ct. must provide appellate review of a trial court judgment when the trial court refused to follow a prior NH Sup.Ct. ruling upholding the petitioner's rights under the Fifth Amendment. *See DeMauro v. DeMauro*, 142 N.H. 879, 712 A.2d 623 (1998 ("*DeMauro I*"). The case raises issues not previously determined by this court but which require resolution because they will be pertinent in future cases in which a state's right to refuse to consider an appeal where there is a serious contention that due process was denied at the trial court level is at issue.

OPINIONS BELOW

The opinion of the NH Sup.Ct. is reported at 794 A.2d 112 (N.H. 2002) ("*DeMauro II*") and is reproduced in Appendix A at A. 1.[1] DeMauro's motion for reconsideration was denied on April 5, 2002 and the order of denial is

[1] Hereinafter ("A.___")

reproduced at A. 13. The judgment and (approved) Findings of Fact of the Rockingham Superior Court, Rockingham, New Hampshire, issued on February 4, 2000, is unreported and reproduced in A. 30.

The opinion of the NH Sup.Ct. upholding the petitioner's right of assertion of privileges against self-incrimination is reported at 142 N.H. 879, 712 A.2d 623 (1998) (*"DeMauro I"*) and is reproduced at A. 61.

In a related collateral action, the opinion of the Court of Appeals for the First Circuit is reported at *DeMauro v. DeMauro et al.*, 115 F.3d 94 (1st Civ. Mass. 1997), *appeal after remand,* 215 F.3d 1311, 2000 WL 231255 (1st Cir. 2000). The final appellate disposition is reproduced at A. 14.

JURISDICTION

The appellate court issued its denial of DeMauro's Motion for Reconsideration of the March 8, 2002 Order on April 5, 2002, which entered on April 8, 2002. This petition is timely filed within ninety (90) days of that order. 28 U.S.C. § 2101(c); Sup.Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves U.S.C.A. Const. Amends. 5 and 14 which are reproduced at A. 52.

STATEMENT OF THE CASE

A. The Proceeding Below

In February 1994, Annette B. DeMauro ("Ms. DeMauro"), the respondent, filed a "Libel for Divorce" against Joseph M. DeMauro ("DeMauro"), the petitioner herein, in the Rockingham County Superior Court, Rockingham County, New Hampshire ("trial court") (A. 37). The procedural and factual history is lengthy as the case spanned 8 years with over 385 pleadings (A. 91).

On June 16, 1998, in *DeMauro I*, the NH Sup.Ct. first addressed and affirmed the defendant's assertion of privilege against self-incrimination in an interlocutory order where the court ruled that DeMauro properly invoked his constitutional privileges and could not be compelled to testify or otherwise offer evidence on his financial circumstances during the period 1976 to the time of trial (A. 37).

On July 30, 1998, after remand to the trial court, Ms. DeMauro filed a Motion to Compel DeMauro to Execute Consent Waivers pursuant to *Doe v. U.S.*, 487 U.S. 201, 108 S.Ct. 2341 (1998). (A. 61, 65).

On October 23, 1998, the trial court granted the Motion to Compel and ordered DeMauro to execute and to deliver the Consent Waivers to Ms. DeMauro's attorney on or before November 22, 1998 (A. 61, 69).

On November 25, 1998, the trial court conducted a hearing on an August 23, 1998 Motion for Contempt filed by Ms. DeMauro for DeMauro's alleged failure to pay spousal support (A. 72).

By Order dated November 25, 1998, the trial court found DeMauro in civil contempt for failing to pay temporary support (A. 71). The trial court also noted that DeMauro

had not executed and delivered the Consent Waivers and issued alternative relief directing a previously appointed receiver to execute the forms on his behalf (A. 72). There was no notice, hearing or judgment of contempt on the issue of DeMauro's failure to execute the Consent Waivers at that time or thereafter (A. 72-73).

On October 29, 1999, DeMauro filed a "Motion in Limine to Exclude Remote and Speculative Evidence of [DeMauro's] Financial Condition." (A. 81). The motion was directed to an extrapolation prepared by Ms. DeMauro's financial expert, Ronald Ouellet ("the Extrapolation") (A. 81). The motion was denied (A. 34). The trial court ordered DeMauro to appear at trial or risk entry of default (A. 33). DeMauro renewed his "Motion in Limine . . . " on the first day of trial in November 1999. It was again denied (A. 88-89).

On February 14, 2000, the trial court issued a Decree granting Ms. DeMauro a divorce on the pleadings, *pro confesso,* and entered a property and alimony award (A. 90). The trial court (Murphy, C.J.) wrongly held that DeMauro's assertion of the privilege had been "rejected . . ., on his appeal, by the Supreme Court . . . " and characterized DeMauro's "continued . . . refusal to disclose" the situation of his assets as "contemptuous" (A. 92, 96). This was the first time that the trial court indicated its lack of understanding of, and refusal to follow, *DeMauro I* (A. 92, 96). The court correctly noted that DeMauro's refusal to execute Consent Waivers was based upon his assertion of Fifth Amendment rights (A. 92).

On March 10, 2000, DeMauro filed a Notice of Appeal, asserting violations of his constitutional rights under the Fifth Amendment and Fourteenth Amendment, and other collateral issues (A. 76-77).

On June 27, 2000, Ms. DeMauro filed a "Motion to Dismiss Appeal of [DeMauro]." Ms. DeMauro raised the issue of DeMauro's alleged contemptuous conduct as a basis for dismissal. By Order dated July 11, 2000, the NH Sup.Ct. denied the motion (A. 11).

On July 21, 2000, the trial court entered a post-judgment order, pursuant to a NH Sup.Ct. order of remand, dated June 29, 2000, allowing the sale of Florida realty which the judgment valued at Four Million Dollars ($4,000,000.00) (A. 63, 107). Proceeds of the sale were to be held in escrow except for certain obligations including "all monies claimed by [Ms. DeMauro] under the temporary order of support which she claims are owed to her from July 1998 to February 4, 2000." (A. 64). The final determination as to whether the Four Hundred Forty Thousand Dollar ($440,000.00) payment "is considered spousal support or a partial distribution of marital property [was] deferred" as were "all issues regarding [DeMauro's] current obligation to pay spousal support" until final judgment issued and the time to appeal expired (A. 64). Thereafter, Ms. DeMauro was paid Four Hundred Forty Thousand Dollars ($440,000.00) from funds secured by the property. The only adjudicated contempt was thereby satisfied, or at least stayed or deferred, by the order (A. 64).

On September 10, 2001, Ms. DeMauro filed a renewed Motion to Dismiss the appeal and by Order dated September 27, 2001, the NH Sup.Ct. stated that a "[r]uling on [Ms. DeMauro's] motion to dismiss [was] deferred until oral argument." (A. 10).

Oral argument was heard on February 6, 2002 (A. 60). On February 12, 2002, DeMauro filed a "Motion to Supplement the Appellate Record to Address a Question Raised During the February 6th Oral Argument." (A. 60).

By Order dated March 8, 2002, the NH Sup.Ct. granted his motion to supplement the record as to the pleadings and trial court orders in the instant action and denied the motion with respect to evidence that DeMauro had executed Consent Waivers on December 8, 2000 in a companion Massachusetts state collection action brought by Ms. DeMauro, fourteen (14) months prior to dismissal (A. 9). Upon allowance of the motion, the appellate record confirmed that there were no judgments of contempt from which DeMauro could have appealed respecting Consent Waivers (A. 9).

By Opinion dated March 8, 2002, the NH Sup.Ct. dismissed the appeal on the basis that DeMauro "refuses to comply with [the court's orders] and as a result DeMauro "has forfeited the right to appellate review of the merits in this case. . . . " (A. 1, 8). The issue of appellate forfeiture was a question of first impression for the court (A. 13). On March 18, 2002, DeMauro filed a Motion for Reconsideration of the March 8, 2002 Opinion (A. 5).

On April 5, 2002, the NH Sup.Ct. denied DeMauro's Motion for Reconsideration (A. 51).

DeMauro timely filed this Petition.

B. Factual Background

The DeMauros were parties to a deeply contested divorce action (A. 14, 37, 91). Ms. DeMauro alleged that DeMauro had engaged in a "systematic effort to conceal assets accumulated during the marriage by creating and fraudulently using trusts, foundations, sham corporations, off shore accounts, straws and other entities." (A. 37). In this action, DeMauro asserted his privileges against self-incrimination under the Fifth Amendment and Part I, Article 15 of the New Hampshire Constitution (A. 40).

DeMauro filed a response to the Libel but did not file a Financial Affidavit as required by Superior Court Rule 158 (A. 38). He also refused to answer interrogatories and other requests for admissions concerning, *inter alia*, his employment, financial background and living expenses, asserting, instead, his constitutional privilege against self-incrimination (A. 38).

In a companion civil RICO action filed in the United States District Court for the District of Massachusetts, Ms. DeMauro also accused DeMauro of engaging in racketeering activity spanning the marriage and "continuing to the present day." (A. 39). (*See DeMauro v. DeMauro*, 115 F.3d 94 (1st Cir. Mass. 1997), *appeal after remand*, 215 F.3d 1311, 2000 WL 231255 (1st Cir. 2000) (the "RICO case")). (A. 14). While the First Circuit affirmed the second dismissal of Ms. DeMauro's RICO action on the basis of pleading defects, it otherwise noted that her complaint may have alleged "serious crimes and reprehensible conduct." 215 F.3d 1311, 2000 WL 231255, *9 (1st Cir. 2000). (A. 31).

Upon DeMauro's assertion of privilege, the NH Sup.Ct. first directed the trial court to conduct a hearing pursuant to *Key Bank v. Latshaw,* 137 N.H. 665, 663 A.2d 952 (1993), ("a *Latshaw* hearing") to determine the propriety of his assertion of privilege (A. 39). After the *Latshaw* hearing, the trial court (improperly) denied DeMauro his Fifth Amendment rights and stated that DeMauro's claim was without merit and ordered him to testify and provide financial information (A. 40). It had previously characterized his assertion as "pure contempt." (A. 38).

Thereafter, the NH Sup.Ct. overturned trial court orders compelling DeMauro to testify in the underlying action and rejected related findings of contempt (A. 37). The NH Sup.Ct. unanimously concluded:

> Here the broad allegations in the civil RICO complaint spanned several decades and alleged improper financial dealings and a host of federal and state crimes involving most, if not all, of the defendant's personal and marital assets. *Thus, nearly any question answered by the defendant related to his financial or business dealings could possibly serve as a link in the chain of evidence, or could tend to incriminate him* . . . .Insofar as the plaintiff's questions related to the defendant's financial activities during the time period at issue, we hold that the superior court abused its discretion by requiring the defendant to answer them. . . . We conclude that the defendant properly asserted his privilege with respect to most questions. With respect to those questions to which the defendant improperly asserted the privilege, we do not see how the answers would be material to determining the equitable distribution of the marital estate.

(A. 45) *DeMauro I*, 142 N.H. at 886, 712 A.2d at 628 (citations omitted) (emphasis supplied).

In response to the apparent conflict between Ms. DeMauro's right to an equitable distribution of assets and DeMauro's constitutional privilege against self-incrimination, the NH Sup.Ct., on remand, stated:

> The plaintiff may take reasonable steps to discover through alternate means the size and scope of the marital estate. . . . The trial court, however, may order the [petitioner] to execute consent waivers consistent with those permitted in federal cases for discovery of assets. *See Doe v. United States*, 487 U.S. 201, 215-16, 108 S.Ct. 2341, 101 L.Ed. 2d (1988). [U]pon the completion of plaintiff's discovery efforts the trial court may fashion an equitable distribution based on all information then

> available and all reasonable inferences to be drawn therefrom. . . . The court may also enter a Decree for division of property subject to modification if additional assets are disclosed or discovered.

Id. at 888, 712 A.2d at 629. (A. 48).

At the November 25, 1998 hearing on a contempt motion, consistent with his assertion of privilege, DeMauro did not offer evidence regarding his alleged nonpayment of support or his alleged ability to make such payments (A. 72). DeMauro had declined to execute the Consent Waivers on the basis of his Fifth Amendment rights (A. 92). The trial court entered an order of contempt on the issue of support and provided Ms. DeMauro alternative relief regarding the Consent Waivers, directing the court-appointed receiver for DeMauro to execute the releases on DeMauro's behalf (A. 73). There was no motion, hearing or finding of contempt respecting DeMauro's failure to execute the Consent Waivers at that time or any time prior to dismissal of his appeal (A. 73).

The receiver, after diligent search throughout the United States and in Europe, identified the real property in (1) Rye Beach, New Hampshire; (2) Manalapan, Florida; and (3) Tennessee, and an ownership interest in oil wells with no present value (A. 111, 100, 103). There was no evidence or finding from which the trial court or NH Sup.Ct. could infer that the receiver's release was not as effective as one executed by DeMauro. (A. 1, 60)

Despite the binding authority of *DeMauro I*, the trial court directed DeMauro to appear at trial or risk entry of default (A. 33, 90). *See Douglas v. Douglas*, 143 N.H. 419, 427, 728 A.2d 215, 220 (1999) (in equity proceeding, upon default, a decree *pro confesso* admits only well pled facts as interlocutory finding for later entry of judgment upon

proof of amount). The trial court entered the default and proceeded to a hearing on damages (A. 90). DeMauro was not held in contempt for failure to appear (A. 90).

At trial, Ms. DeMauro introduced into evidence Extrapolations (the subject of the Motion in Limine) prepared by her current financial adviser (A. 88, 89). The Extrapolations were based upon Ms. DeMauro's memory of records she claimed to have seen between 1979-1991 and from that data the expert projected an estimated present value (A. 94, 99-100, 102, 106-107). One version was prepared by Ms. DeMauro's expert in response to her comments (A. 106, 88). The other was prepared by her expert in response to suggestions made by Ms. DeMauro's attorney who recommended altering the financial data for years 1996, and thereafter (some five years after separation), so that, as counsel explained, the compilations would seem more reasonable (A. 89).

The court accepted both Extrapolations over DeMauro's objection that the evidence constituted inadmissible hearsay, being both remote and speculative (A. 79). The trial court noted DeMauro's failure to provide financial information and justified acceptance of the Extrapolation(s) stating:

> The Rules of Evidence [don't] apply based upon the fact that this is the only information we have . . . So the only information we have is old information, and otherwise it's all speculation, and I'm going to permit the admission of that evidence relative to Mr. Ouelette's opinion based upon an extrapolation of the old information (A. 79).[2]

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[2] Although New Hampshire's codified Rules of Evidence do not apply strictly in divorce proceedings, the common law rules of evidence apply because they survived codification. N.H.R. Evid. 100; 1101(d)(3).

Notwithstanding DeMauro's proper assertion of privilege, the court entered a property award for Ms. DeMauro of Thirty Five Million Dollars ($35,000,000.00), stating that it represented not more than one-half the estate, and an alimony award of Twenty Thousand Dollars ($20,000.00) per month for five (5) years (A. 93, 96). The trial court also awarded Ms. DeMauro an unknown and consequently unvalued "investment accounts now or formerly standing in the name of Redonia Foundation" for which the only physical evidence was the Extrapolation that had projected hypothetical future values of amounts allegedly earned eight to twenty years prior to the trial (A. 108). The known assets were valued at less than Eleven Million Dollars ($11,000,000.00) (A. 108). The only offer regarding the value of Redonia was some evidence that a "Redonia Foundation" had given or loaned to a corporation in which a son had an interest (A. 108). Even if the asset could have been considered DeMauro's, the amount of money involved was approximately Two Million Six Hundred Thousand Dollars ($2,600,000) (A. 108).

DeMauro's Notice of Appeal to the NH Sup.Ct. addressed the trial court's obvious error respecting the Fifth Amendment and the improper sanctions imposed in response to DeMauro's consistent assertion of privilege and subsequent refusal to appear to testify (A. 69). *See also* N.H. Sup.Ct., Rule 16(3)(b) (question presented in Notice of Appeal includes subsidiary questions).

Ms. DeMauro was paid Four Hundred Forty Thousand Dollars ($440,000.00) from money secured by the Florida property which represented the full amount owed due to the November 28, 1998 contempt order, updated in the Decree and subject to review by the NH Sup.Ct., pursuant to the July 21, 2000 order (A. 64).

At oral argument, the NH Sup.Ct. court questioned whether DeMauro was in contempt at the time of the appeal (A. 60). After oral argument, the court later accepted evidence to supplement the record on appeal which confirmed that there were no outstanding contempts against DeMauro respecting the Consent Waivers and that Ms. DeMauro had been paid an amount equal to the owed support (A. 60, 9). That payment either effectively purged the contempt, or stayed its binding authority until final disposition of the case (A. 64).

C. The Opinion of the NH Sup.Ct.

The appeal raised substantial violations of constitutionally guaranteed rights, which imposed upon the NH Sup.Ct. the obligation to rule in accordance with the appropriate constitutional mandates. U.S. Const. Amends. 5, 14. In a case of first impression, the court created a civil appellate penalty rule whereby an appellant in contempt of trial court orders may have his appeal dismissed (A. 1, 8). In this case, DeMauro was not in contempt at the time of the ruling (A. 64, 90). Moreover, the court did not articulate a government interest that dismissal would reasonably protect (A. 1-8). Nevertheless, the appeal was dismissed (A. 8).

The new rule is unconstitutional because the court made no inquiry into its obligations under the Fifth and Fourteenth Amendments. The court never considered its own obligation to rule on the issues of due process and the failure of the trial court to recognize DeMauro's rights under the Fifth Amendment, including the right not to be penalized (A. 8). *See Spevack v. Klein*, 385 U.S. 511, 514-15, 87 U.S. 625, 627 (1967). The NH Sup.Ct. instead treated the appeal as a claim for redistribution of an unequal property award under state law (A. 8).

Although the NH Sup.Ct. did not specify as to what act of contempt it considered required dismissal of the appeal, there are only four matters possibly referred to:

(1) The trial court's mistaken statement that DeMauro's failure to disclose the situation of his assets was "contemptuous"; (A. 92)

(2) The November 28, 1998 contempt order for support which was dealt with in July, 2000; (A. 72, 64)

(3) The trial court's original findings of contempt respecting DeMauro's failure to testify at the *Latshaw* hearing, which were rejected in *DeMauro I*; (A. 37, 38) or

(4) DeMauro's failure to execute Consent Waivers, which did not result in an order of contempt, based upon notice or hearing, from which an appeal could be taken (A. 60, 72-73).

Since all of the above possible grounds for dismissal had been cured by alternative means or by adjudication in *DeMauro I*, the dismissal rested on the general reference to his non-compliant conduct (A. 8). Basing dismissal on the reed-thin statement that DeMauro had "refused to comply with various trial court orders including one to execute consent forms for the purpose of ascertaining his financial status" or that "his actions overall reflect a pattern of conduct" was error. It created a rule where appellate rights, and with them due process at trial, are granted when and to whom the state chooses, but not likely to a defendant whose assertion of privilege creates tension with the trial court (A. 8).

National Union of Maritime Cooks & Stewards v. Arnold, 348 U.S. 37, 75 S.Ct. 92 (1954), offers no support for this decision nor does the state law cited in the ruling provide support for dismissal of an appeal where federal

constitutional rights were central. *See National Union, supra* (dismissal of appeal which does not raise constitutional issues was allowed). *See also TMS, Inc. v. Aihara*, 71 Cal. App. 4th 377, 379-80, 83 Cal. Rptr. 2d 834, 834-35 (1999); *Schmidt v. Schmidt*, 610 A.2d 1374, 1376-77 (Del. 1992); *Keidaish v. Smith*, 400 So.2d 90, 91 (Fla. Dist. Ct. App. 1981); *Prevenas v. Prevenas*, 193 Neb. 399, 227 N.W.2d 29, 29-30 (1975); *D'Aston v. D'Aston*, 790 P.2d 590, 593 (Utah Ct. App. 1990).

The NH Sup.Ct.'s finding that DeMauro's "overall actions reflect a pattern of conduct . . . detrimental to the plaintiff" indicates that it is more important to punish a defendant for failing to faithfully perform a directive of the trial court than it is to correct the actions of a trial justice who has refused to follow the directives of a higher court (A. 8). That decision does not comport with the Fifth or Fourteenth Amendment. U.S.C.A. Const. Amends. 5 and 14. Moreover, the procedural history in this lengthy matter had shown that orders of contempt and alleged contemptuous conduct were so intertwined with the proper assertion of privilege that neither should have outweighed a meritorious appeal raising constitutional issues (A. 60, 37).

REASONS FOR GRANTING THE WRIT

I. There is a constitutional right to appellate review where a litigant has been denied due process in the trial court.

New Hampshire law generally provides no litigant, criminal or civil, an automatic right of appeal. Rule 7, NH Supreme Court Rules. *See also State v. Cooper*, 127 N.H. 119, 121, 498 A.2d 1209, 1211 (1985) (criminal appeals

from felony convictions are wholly discretionary); *Bundy v. Wilson*, 815 F.2d 125, 128 (1st Cir. 1987) (New Hampshire stood alone as the only state in the nation which refused to provide a transcript to a felony criminal defendant). Under federal law, there generally is no right to appellate review. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 32, 107 S.Ct. 1519, 1537 (1987) (Stevens, J., concurring). However, a state court may not decline to hear an appeal where the appeal is predicated upon a fundamental and obvious denial of due process at trial. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 281 U.S. 74, 80, 50 S.Ct. 228, 330-31 (1930). Appellate review is constitutionally mandated, where the appellant has been denied due process in the trial court. In *Bryant* this Court stated:

> As to the due process clause of the Fourteenth Amendment . . . the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.

281 U.S. at 80, 50 S.Ct. at 330-31.[3] The reverse also is true. *See, e.g., Gerlof v. Gulotta*, 87 Misc. 2d 768, 778, 386 N.Y.S.2d 790, 798 (N.Y. Sup.Ct. 1976), *modified on other grounds*, 57 A.D.2d 821 (N.Y.A.D. 1977) (citing *Bryant*) ("Appellate review . . . required where a litigant has been denied due process in the trial court").

The trial court's ruling and Decree demonstrate a *prima facie* denial of petitioner's due process rights and constitutionally protected privilege against self-incrimination (A. 82). Surely, a state appellate court's

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[3] *See also Perry v. Aamco Transmissions*, 126 Misc. 2d 454, 456, 481 N.Y.S.2d 1007, 1007 (City Ct. N.Y.) ("provided that due process has already been accorded in the tribunal of first instance"); *State v. Smith*, 80 Ohio St. 3d 89, 97, 684 N.E.2d 668, 680 (1997) (same).

discretion to accept or deny an appeal, or in this instance to accept and later dismiss an appeal, must be exercised subject to the due process requirements of the Fifth and Fourteenth Amendments if those guaranties of liberty are to have any practical effect and meaning. If a state appellate court had discretion to pick and choose when, *and for whom*, it will afford federal constitutionally protected rights, due process is trivialized. More troubling, in this case the NH Sup.Ct. first recognized the validity of asserted constitutional rights during pretrial discovery but then effectively condoned denial of the very same rights at trial by dismissing a meritorious appeal. *Compare DeMauro I* and *DeMauro II*. Because the decision to dismiss DeMauro's appeal established a rule of system-wide application, the deprivations of due process suffered by him will likely be inflicted upon other litigants unless this Court strikes down the NH Sup.Ct.'s new rule limiting appellate review.

II. THE NEW HAMPSHIRE TRIAL COURT's FAILURE TO ABIDE BY AND RULE IN ACCORD WITH *DEMAURO I* VIOLATED DUE PROCESS.

A. The Fifth And Fourteenth Amendments Guarantee Due Process of Law.

The Fourteenth Amendment imposes upon states the standards necessary to ensure that its judicial proceedings are, indeed, fundamentally fair. U.S. Const. Amend. 14.[4] When measuring the potential denial of due process, the "magnitude of the deprivation is of critical significance in

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[4] *See In re Gault*, 387 U.S. 1, 19-21, 87 S.Ct. 1428, 1439 (1967).

the calculus" of the process to which an individual is entitled.[5] Substantive due process "protects individual liberty against 'certain government actions regardless of the fairness of the proceedings used to implement them.'" *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-1069 (1992)). Here, DeMauro's property rights were adjudicated and his Fifth Amendment rights rejected, in a hearing devoid of due process.

The trial court violated DeMauro's due process rights: (1) by disregarding the common law rules of evidence in response to his proper assertion of the privilege (A. 70-71); (2) by employing an improper presumption or inference as to DeMauro's financial condition at the time of trial based upon facts in evidence which had no probative value to the fact presumed or inferred (A. 88, 89, 98-100); (3) by entering a judgment against DeMauro based on what, effectively, was no evidence at all (A. 88, 89, 98-100); and (4) by acting with bias toward DeMauro, because his proper assertion of privilege against self-incrimination frustrated the court, which found his silence in reliance upon a valid privilege to be "contemptuous." (A. 96).

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[5] *Lassiter v. Dept. of Social Services of Durham County, North Carolina*, 452 U.S. 18, 39, 101 S.Ct. 2153, 2166 (1981), *reh'g denied*, 453 U.S. 927, 102 S.Ct. 889 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 (1970) (quoting *Joint Anti-Fascists Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646 (Frankfurter, J., concurring)).

1. Federal review of the New Hampshire trial court's evidentiary rulings is proper because those rulings denied DeMauro due process.

While federal review of state evidentiary rulings typically is unavailable, review is proper and necessary where "state court evidentiary rulings [. . .] offend a specific constitutional guarantee or are so egregious or irrational as to deprive the defendant of a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment." *Hubbard v. Cannon*, 403 F. Supp. 675, 678 (N.D.Ill. 1975) (federal habeas corpus court would review state findings that implicate Sixth Amendment right "in accord with *Miranda*.")

2. The trial court denied DeMauro due process by disregarding the common law rules of evidence in response to DeMauro's proper assertion of his privilege against self-incrimination.

The trial court made clear that the Extrapolation was taken into evidence solely because, as a result of DeMauro's having asserted a constitutional privilege, there was no other probative evidence on the issue of DeMauro's financial condition (A. 99). While the Rules of Evidence are relaxed in divorce proceedings, the enabling provision of the New Hampshire Rules of Evidence states that common law rules of evidence survived the adoption of the codified rules where the common law rules did not conflict. N.H.R. Evid. 100; 1101(d)(3). The preexisting common law rules of evidence, including the vital requirements of probative value and relevance, survived and should have governed the trial court's admission of evidence. N.H.R. Evid. 100,

1101(d)(3) and Reporter's Notes; *see also Pflug v. Pflug*, 92 N.H. 247, 248, 29 A.2d 422, 423 (1942) (a finding that is contrary to evidence will be set aside), *Ballou v. Ballou*, 95 N.H. 105, 106, 58 A.2d 311, 312 (1948) (trial court's discretion is not unfettered). The Extrapolation failed the most basic requirements for admissibility, that the evidence be relevant and probative as to DeMauro's financial condition at the time of trial.

In *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 671, 633 A.2d 952, 956 (1993), the NH Sup.Ct. established a bright line test to determine when evidence is too remote or speculative to be probative. *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 671, 633 A.2d 952, 956 (1993). Specifically, *Latshaw* held that answers to questions concerning Latshaw's present financial condition would not furnish even a link in the chain of evidence necessary to prosecute him for lying on a financial statement filed 3 years and five months earlier. *Id.* Finding the evidence remote and speculative, *Latshaw* states, in part,

> that as the time increases between any two factual conditions, the connection between them becomes weaker and weaker ... such that a discovery that Mr. Latshaw is now insolvent would no longer tend to prove that he was also insolvent in June 1990. We have reached the point where evidence of Mr. Latshaw's present insolvency would not furnish a link in the chain of evidence needed to prosecute him for lying on his June 1990 financial statement.

Id.

Under *Latshaw*, financial conditions in the remote past have no relevance to present financial conditions. *Id.* Thus, DeMauro's alleged financial condition in 1979, when the parties married, or in 1991, when they separated, is

not evidence of his financial condition at the time of trial in November 1999. *Id.* Even if the Extrapolations were not hearsay, but competent evidence of DeMauro's financial condition at those earlier times, they still were not relevant evidence of his financial status in 1999.

3. The trial court denied DeMauro due process by basing its distribution of marital assets entirely upon an inference or presumption improperly drawn from irrelevant evidence.

Presuming or inferring present financial condition from evidence which had no relevance to that issue, the trial court further denied DeMauro his due process rights. A court may constitutionally presume the existence of one fact from the proof of another, but due process imposes limits on such presumptions. *Leary v. U.S.*, 395 U.S. 6, 33, 89 S.Ct. 1532, 1546-47 (1969). The *Leary* Court stated:

> Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Leary, 395 U.S. at 33, 89 S.Ct. at 1546-47.[6] The requirement of a "rational connection between the fact proved and

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[6] *See also Tot v. U.S.*, 319 U.S. 463, 467-68, 63 S.Ct. 1241, 1245 (1943); *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S.Ct. 136, 138 (1910); *U.S. v. Bianco*, 922 F.2d 910, 912 (1st Cir. 1991); *Colon-Rosich v. People of Puerto Rico*, 256 F.2d 393, 397-98 (1st Cir. 1958); *Cases v. U.S.*, 131 F.2d 916, 923 (1st Cir. 1942); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1030-31 (5th Cir. 1981); *Barrett v. U.S.*, 322 F.2d 292, 297 (5th Cir. 1963), *rev'd on other grounds, U.S. v. Gainey*, 380 U.S. 63, 85 S.Ct. 754 (1965); *People v.*

(Continued on following page)

the ultimate fact presumed" applies to presumption in civil cases as well in the criminal context. *Barrett,* 322 F.2d at 297.

Here, there was no rational connection between the facts which the trial court allowed in evidence (the Extrapolations' historical data), and the fact presumed or inferred (DeMauro's financial condition at the time of trial as estimated on the various Extrapolations) (A. 80-81). Ms. DeMauro's subsequent offerings respecting DeMauro's current worth, *i.e.*, alleged revelations months before trial that he controlled upwards of One Hundred Fifty Million Dollars ($150,000,000.00), were all taken into evidence against the backdrop of the Extrapolation and the trial court's misguided view of DeMauro's privilege against self-incrimination (A. 92, 96). Consequently, evidence other than the Extrapolations was inextricably poisoned when accepted in that context, leaving no probative evidence.

4. The trial court denied DeMauro due process by basing its distribution of assets on no evidence at all.

"It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due

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Cloward, 196 Cal. App. 2d 669, 16 Cal. Rptr. 772, 774 (1961); *Pizza v. Wolf Creek Ski Devel. Corp.*, 711 P.2d 671, 678 (Colo. 1985); *In Interest of L.D.B.*, 20 Kan. App. 2d 643, 645-46, 891 P.2d 468, 470-71 (1995); *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446, 454 (Ky. 1994); *People v. Abate*, 105 Mich. App. 274, 283, 306 N.W.2d 476, 481 (1981); *Fairfax County Fire and Rescue Services v. Newman*, 222 Va. 535, 539, 281 S.E.2d 897, 900 (1981); *Crenshaw v. Com.*, 219 Va. 38, 42, 245 S.E.2d 243, 246 (1978); *State v. Hermann*, 164 Wis. 2d 269, 284, 474 N.W.2d 906, 912, *reh'g denied*, 447 N.W.2d 286 (1991).

process." *Vachon v. New Hampshire*, 414 U.S. 478, 480, 94 S.Ct. 664, 665 (1974), quoting *Harris v. U.S.*, 404 U.S. 1232, 1233, 92 S.Ct. 10, 12 (1971) and citing *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960). *See also Johnson v. Florida*, 391 U.S. 596, 598-99, 88 S.Ct. 1713, 1715 (1968). The "no evidence" rule, defeating entry of a judgment based on the lack of any admissible evidence, applies in civil cases as well.[7] The court in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 (3rd Cir. 1983), *rev'd on other grounds, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986), noted that a judgment supported by no evidence on an essential element violates due process. The Extrapolation is squarely inadmissible and the balance of the offered evidence is poisoned by the trial court's bias with respect to the Fifth Amendment. Thus, the Decree divesting DeMauro of approximately 300% of his alleged assets really stands on no evidence.

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[7] *Spruytte v. Walters*, 753 F.2d 498, 508-09 (6th Cir. 1985) (action by inmate against prison officials for prohibiting him from receiving dictionary); *McClendon v. Rosetti*, 460 F.2d 111, 115 (2d Cir. 1972) (no evidence rule applies in forfeiture proceedings even though the government's burden of proof is only a preponderance of the evidence); *James P. v. Lemahieu*, 84 F. Supp.2d 1113, 1119-20 (D. Hawaii 2000) ("the Ninth Circuit has also upheld the 'evidence of guilt' requirement in administrative decision"); *Jones v. Latexo Independent School Dist.*, 499 F. Supp. 223, 238 (E.D.Tex. 1980) (action against school district by suspended students); *McDonald v. Board of Trustees of University of Illinois*, 375 F. Supp. 95, 102-03 (N.D. Ill. 1974), *aff'd*, 503 F.2d 105 (7th Cir. 1974) (applying the "some evidence" standard of proof dictated by the no evidence rule to actions by medical students against university which had expelled them).

5. The trial court's evidentiary rulings and Decree show a bias against DeMauro based on his valid assertion of constitutional rights, which alone, constitutes a denial of due process.

The trial court's actions also evidence a bias sufficient, in itself, to deny DeMauro his due process rights. Due process requires a meaningful hearing before a judge who harbors neither bias toward a litigant nor a predisposition as to the outcome of the hearing. *See Bracy v. Gramley,* 520 U.S. 899, 894, 117 S.Ct. 1793, 1794 (1997) (corruption of judicial process which determined outcome of a case was *per se* violation of due process.) The bias directed toward DeMauro, on the basis of his assertion of privileges against self-incrimination, is serious, and resulted in DeMauro being punished for his valid assertion of his constitutional rights against self-incrimination. Such bias, while perhaps more nuanced than in *Bracy*, is no less offensive to DeMauro's right to a fair trial and due process.

III. THE NEW HAMPSHIRE TRIAL COURT IMPOSED UNCONSTITUTIONAL SANCTIONS OR PUNISHMENTS AGAINST DEMAURO FOR HIS PROPER ASSERTION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The trial court's rulings improperly burdened DeMauro's Fifth Amendment rights.

Denial of DeMauro's Fifth Amendment rights is at the core of his claim of denial of due process. Violations of his Fifth Amendment rights are also independent sufficient grounds for appeal, and for this Petition. *Spevack v. Klein*,

385 U.S. 511, 514-15, 87 S.Ct. 625, 627-28 (1967); *Malloy v. Hogan*, 378 U.S. 1, 89, 84 S.Ct. 1489, 1493-94 (1964); U.S. Const. Amend. 5. The Fifth Amendment secures a privilege "to remain silent . . . and to suffer no penalty . . . for [that] silence." *Spevack*, 385 U.S. at 514, 87 S.Ct. at 627-28. A "penalty" is the "imposition of any sanction which makes the assertion of the Fifth Amendment privilege costly." *Id.* at 515, 87 S.Ct. at 628. Purposeful acceptance of irrelevant, non-probative evidence in response to a proper assertion of privilege during discovery and failure to testify at trial, is an unconstitutional penalty. U.S. Const. Amend. 5.

The trial court also drew an improper adverse inference against DeMauro, based on his reliance on the Fifth Amendment by inferring that Thirty Five Million Dollars was not more than one-half of his estate. A negative inference may be drawn, under federal law, *only* if Ms. DeMauro had provided other probative evidence tending to establish the fact to be inferred. *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558 (1976).[8]

B. The constitutional issues were identified and presented on appeal.

The constitutional issues were adequately identified and presented before the trial court and on appeal. *See also* N.H. Sup.Ct. 16(3)(b). Even where constitutional issues are not raised below, this Court can notice and

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[8] The state law even bars an adverse inference based upon a civil litigant's assertion of the privilege against self-incrimination. N.H. R. Evid. 512; *see also Fischer v. Hooper,* 143 N.H. 585 (1999).

correct plain error, where failure to do so would result in fundamental unfairness.[9]

IV. THE NEW RULE PROVIDING FOR DISMISSAL OF AN APPEAL RAISING OBVIOUS CONSTITUTIONAL ISSUES ON THE BASIS OF AN APPELLANT'S ALLEGED "CONTEMPTUOUS" CONDUCT IS CONSTITUTIONALLY DEFECTIVE.

A. Dismissal of DeMauro's appeal failed to satisfy the minimum standards established by this Court in *National Union of Maritime Cooks & Stewards v. Arnold.*

The NH Sup.Ct. ignored the ruling in *National Union*, 348 U.S. at 38, 75 S.Ct. at 93, which addressed the constitutionality of dismissals of civil appeals based on an appellant's contempt. The issue raised on appeal in *National Union* was "whether a state appellate court violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment ... when it dismisses an

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[9] *Wood v. Georgia*, 450 U.S. 261, 264-65 and n. 5, 101 S.Ct. 1097, 1100 and n. 5 (1981) (the court took notice of a possible due process violation not raised in the trial court because fundamental right at stake). *See also Williams v. Florida*, 465 U.S. 1109, 1112, 104 S.Ct. 1617, 1619 (1984) (Marshall, J., dissent) (the rule is not absolute ... "[w]hen the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below."). *See also Webb v. Webb*, 451 U.S. 493, 502, 101 S.Ct. 1889, 1894 (Powell, J., concurring); *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664 (1974).

appeal from a money judgment." *Id.* at 38, 75 S.Ct. at 94-95. Specifically, *National Union*, questioned whether dismissal of an appeal,

> "amounts to due process of law where it constitutes a reasonable means of safeguarding the collectibility of the judgment. If so, [the court] may then consider whether dismissal in the instant case constituted such means."

Id. at 348 U.S. at 41, 75 S.Ct. at 94-95.

National Union determined, as a predicate finding, that the appeal before it did not raise any constitutional issues, and was limited to state law issues respecting a money judgment. *Id.* The *National Union* Court did not endorse the dismissal of an appeal based upon contempt where constitutional rights are at issue. *Id. See also In re Feit & Drexler Inc. v. Drexler,* 760 F.2d 406, 413 (2d Cir. 1985) (*National Union* stands only for principle that when appeal does not raise either an equal protection or due process issue, a state court may dismiss an appeal from a money judgment if conduct of the appellant impairs judgment during pendency of appeal). Nor do the state cases relied upon by the NH Sup.Ct. support dismissal where constitutional issues are at stake.[10]

This Court distinguished *National Union* from *Hovey v. Eliot,* 167 U.S. 409, 17 S.Ct. 841 (1897) and *McVeigh v.*

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[10] *See TMS, Inc. v. Aihara*, 71 Cal. App. 4th 377, 380, 83 Cal. Rptr. 2d 834, 834-35 (1999); *Schmidt v. Schmidt*, 610 A.2d 1374, 1376-77 (Del. 1992); *Keidaish v. Smith*, 400 So.2d 90, 91 (Fla. Dist. Ct. App. 1981); *Prevenas v. Prevenas*, 193 Neb. 399, 227 N.W.2d 29, 29-30 (1975); *D'Aston,* 790 P.2d at 593; *MacPherson v. MacPherson*, 13 Cal. 2d 271, 272-73, 89 P.2d 382, 385 (1939); *United Electrical, Radio, and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992).

United States, 11 Wall (78 U.S.) 259 (1870), stating that *Hovey* concerned "the initial deprivation of the defendant's right to defend himself, akin to due process." 348 U.S. at 41, 75 S.Ct. at 95. The NH Sup.Ct. regarded *Hovey* and *McVeigh* as "inapposite", and failed to cite *National Union* at all (A. 6). Its rationale led to the improper result that due process rights attach only at trial and, if not afforded there, the state has no further obligation (A. 2).

With *National Union* as a guide, prior to dismissing an appeal a state court must find that:

- No constitutional question has been raised;
- The appellant has been afforded due process in the trial court;
- The contempt impairs an articulated state interest, i.e., entry of enforceable judgments, *and* that dismissal is the most reasonable means to safeguard that governmental interest;
- There is an actual order or judgment of contempt on the record which is not the subject of appeal.

Here the NH Sup.Ct. made no inquiry into its obligations under the Fourteenth Amendment even though the denial of due process was central to DeMauro's appeal. It recast DeMauro's appeal as a challenge to the "trial court's valuation of the marital assets" and bypassed the constitutional issues on appeal with a brief comment that DeMauro "also argues that the trial court penalized him for exercising his right to remain silent." (A. 4). DeMauro was aggrieved that the trial court had reached such an unfair result based upon evidentiary rulings intended to be, and operating as, punishment for his proper assertion of Fifth Amendment rights. The trial court order was unfair for

that reason, not because the distribution of property was allegedly unequal.

The new rule invites due process violations because the dismissal of an appeal could have the effect of denying a litigant any day in court. It also creates an equal protection problem, for out of favor litigants (for example, defendants who do not meet decorum standards), even though they are not in contempt or even have never been adjudicated in contempt, have their appeals dismissed for their generally non-compliant conduct or unpleasant behavior. Their appeals will be dismissed, and their due process rights forever denied, while that same conduct would not impair the appellate rights of less disfavored litigants.

B. Even if proper, the new appellate forfeiture rule cannot apply to DeMauro as there was no outstanding contempt judgment at the time the appeal was dismissed.

The new rule allows for dismissal on the basis of contempt where "the issue of contempt is not being appealed." (A. 7). However, that *caveat* necessarily assumes the entry of an appealable order or judgment of contempt. Without such an order or judgment, the alleged contemnor cannot appeal the contempt and dismissal of an appeal on the basis of the contempt should be prohibited. DeMauro was not held in contempt for failing to sign the Consent Waivers, and in fact, just days after the deadline for signing, the trial court granted Ms. DeMauro alternative relief (A. 73). DeMauro's failure to sign the releases by November 22, 1998 was rendered moot of any "contempt" as soon as the trial court ordered the alternative relief and

DeMauro could reasonably rely upon that order until he was provided notice otherwise.

Further, DeMauro's resistance to signing such releases was justified in view of the differences between *Doe v. U.S.*, 487 U.S. 201, 108 S.Ct. 2341 (1988) and the present case. Unlike *Doe*, DeMauro was a civil defendant ordered to execute a blank release where *DeMauro I* notes that Ms. DeMauro had disclosed her knowledge of potential advance targets for the releases (A. 38, 42). That gives rise to the question of whether or not the act of execution was in any way testimonial and therefore protected by the Fifth Amendment. *See Doe*, 487 U.S. at 206, 108 S.Ct. at 2345 (criminal defendant required to execute release to produce tax returns to government prosecutor). *See also U.S. v. Hubbell*, 530 U.S. 27, 49, 120 S.Ct. 2037, 2050 (2000) (Thomas, J., concurring) (historically the Fifth Amendment protections may have contemplated protection from acts relating to production, as well as testimonial, evidence); U.S. Const. Amend. 5.

Here, the new appellate penalty rule was applied selectively against DeMauro as his conduct was outside the scope of the rule. Thus, even if the new rule passes constitutional muster, it gives rise to equal protection violations in its application in this instance and likely with respect to future litigants.

C. Only a new trial will remedy the denial of DeMauro's constitutional rights.

The cases relied upon by the NH Sup.Ct., almost without exception, provide an opportunity to cure.[11] Here,

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[11] *Keidaish*, 400 So.2d at 91 (appellant provided 20 days within which to make court-ordered payment or appeal would be dismissed); *Prevenas*, 193 Neb. at 399, 227 N.W.2d at 29-30 (1975) (appellant

(Continued on following page)

cure is inapt as there is no outstanding contempt to cure. Further, "cure" does not mitigate the bias, prejudice or penalty imposed upon DeMauro solely because he properly asserted his Fifth Amendment rights. Thus, a new trial before a different justice is required.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Hampshire Supreme Court.

Respectfully submitted,

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provided 20 days within which to make court-ordered payment or appeal would be dismissed); *D'Aston*, 790 P.2d at 593 (appellant provided 30 days before appeal dismissed for failure to submit to process); *Schmidt v. Schmidt*, 610 A.2d at 1376-77 (post-judgment failure to place disputed funds in escrow is basis for dismissal until contempt is purged; *cf TMS, Inc.*, 71 Cal. App. 4th at 380, 83 Cal. Rptr. 2d at 834-35 (defendant/judgment debtor's failure to respond to post-judgment interrogatories in aid of enforcement of money judgment was basis for dismissal of appeal from money judgment). *See also Von Hake v. Thomas*, 858 P.2d 193, 197 (Utah App. 1993), *cert. granted*, 868 P.2d 95 (1993), *opinion after remand*, 881 P.2d 895 (Utah App. 1994) (defendant unable to submit to service jurisdiction within 30-day grace period because he was serving 5-year sentence for tax fraud).

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.state.nh.us/courts/supreme.htm

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2000-147

ANNETTE B. DEMAURO

v.

JOSEPH M. DEMAURO

Argued: February 6, 2002
Decided: March 8, 2002

Tober Law Offices, P.A., of Portsmouth (*Heidi E. Shealy* and *Stephen L. Tober* on the brief, and *Mr. Tober* orally), and *S. James Boumil*, of Lowell, Massachusetts, on the brief and orally, for the plaintiff.

Sanders & McDermot, P.L.L.C., of Hampton (*Lawrence M. Edelman* on the brief and orally), *Barron & Stadfeld, P.C.*, of Boston, Massachusetts (*Bernard A. Dwork* on the brief), and *Zevnik Horton Palmer, L.L.P.*, of Boston, Massachusetts (*Kathleen M. Morrissey* on the brief), for the defendant.

DALIANIS, J. In this divorce proceeding, the defendant, Joseph M. DeMauro, appeals an order of the Superior Court (*Murphy*, J.) awarding the plaintiff, among other things, thirty-five million dollars in marital assets and alimony of twenty thousand dollars per month. He argues that the superior court's valuation of the marital assets was erroneous because it relied upon remote and speculative evidence. The plaintiff moves to dismiss the appeal on the ground that the defendant remains in contempt of various superior court orders relating to the divorce action. Having carefully considered the parties' arguments and the circumstances involved, we dismiss the defendant's appeal.

This is the second time this case has reached us on appeal. *See DeMauro v. DeMauro,* 142 N.H. 879 (1998) (*DeMauro I*). In summarizing the relevant facts of this case, we incorporate by reference the facts detailed in *DeMauro I*.

In *DeMauro I*, we held that the defendant had the right to assert his privilege against self-incrimination relative to certain questions regarding his financial condition, and remanded the case for further proceedings. *Id.* at 886. We noted that "[t]he defendant's assertion of privilege, however, cannot be used as a means of preventing the orderly resolution of civil matters and deprive the plaintiff of her rights." *Id.* at 887 (quotation and brackets omitted). Thus, we stated that the trial court, among other things, could order the defendant to execute consent waivers or authorizations consistent with those permitted in federal cases for the purpose of discovering his assets. *See id.* at 888; *Doe v. United States,* 487 U.S. 201, 215-16 (1988).

In *Doe v. United States,* the Supreme Court held that a court order requiring a defendant to execute consent forms directing banks to release any records regarding assets he may hold did not violate his right against self-incrimination protected by the Fifth Amendment. *See Doe,* 487 U.S. at 219. The Court reasoned that executing the form did not violate his constitutional rights because it was not testimonial in nature since "neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any information to the Government." *Id.* at 215.

On remand, the trial court ordered the defendant to produce records and to execute authorizations for the purpose of discovering assets, but he refused to do so. Eventually, the trial court appointed a receiver to execute the waivers in an attempt to ascertain the defendant's actual financial situation. The receiver was, however, unable to verify many of the defendant's assets, including assets believed to be kept in foreign financial institutions.

At a hearing on the merits, given the lack of current information regarding the defendant's financial status, the plaintiff was allowed to introduce, over the defendant's objection, an extrapolation of historical data together with projections of the defendant's then current financial situation. This extrapolation, prepared by her expert, was based upon bank records the plaintiff had in her possession.

In its divorce decree, dated February 4, 2000, the trial court noted that the defendant was found to be in contempt for, among other things, failing to produce court-ordered authorizations to determine his financial status, and for failing to provide temporary support to the plaintiff. As a

result, warrants were issued for the defendant's arrest. In addition, the court found that

> the defendant ha[d] indicated to the plaintiff that unless she acceded to his offers for the payment of alimony and division of marital property, she w[ould] never receive anything from him and that he would continue, with the aid of his vast financial resources, to avoid service of process and arrest, a threat which has proven to be all too accurate to date.
>
> . . . .
>
> The defendant ha[d] been engaged in a continuing and calculated effort to conceal the true extent of his business and personal assets by investing monies in off-shore accounts and in various foundations formed in foreign jurisdictions.

The trial court awarded the plaintiff thirty-five million dollars, which it determined was no more than fifty percent of the value of the marital assets and represented a "fair and equitable division of the parties' marital property to the extent that the marital assets are known in light of defendant's refusal to disclose their extent." In addition, the trial court awarded the plaintiff alimony in the amount of $20,000 per month for five years.

On appeal, the defendant argues that the trial court's valuation of the marital assets was erroneous because it relied upon evidence that was remote and speculative. He also argues that the trial court penalized him for exercising his right to remain silent. The plaintiff argues, however, that the defendant's appeal must be dismissed because he continues to stand in contempt of trial court orders, specifically, his failure to pay spousal support or to

comply with the court's order to execute authorizations for financial records. For the reasons discussed below, we dismiss the appeal.

The issue of whether an appellate court may dismiss a civil appeal when the appellant is in contempt of a trial court order is a question of first impression for this court. We have, however, addressed the issue in the context of criminal appeals, *see State v. Patten,* 134 N.H. 319 (1991), holding that "when a defendant escapes from confinement and remains a fugitive from justice, he or she has forfeited the right to appellate review." *Id.* at 321. A number of jurisdictions that have addressed this issue as to civil matters have held that an appellate court may dismiss an appeal by a party who has refused to comply with a trial court order. *See, e.g., TMS, Inc. v. Aihara,* 83 Cal. Rptr. 2d 834, 834-35 (Ct. App. 1999); *Schmidt v. Schmidt,* 610 A.2d 1374, 1376-77 (Del. 1992); *Keidaish v. Smith,* 400 So. 2d 90, 91 (Fla. Dist. Ct. App. 1981); *Prevenas v. Prevenas,* 227 N.W.2d 29, 29-30 (Neb. 1975). The rationale underlying these decisions is that "it violates the principles of justice to allow a party who flaunts the orders of the courts to seek judicial assistance." *D'Aston v. D'Aston,* 790 P.2d 590, 593 (Utah Ct. App. 1990).

For example, in *Schmidt*, the court dismissed an appeal challenging a trial court's division of property where the appellant failed to comply with a trial court order to place a specified sum of money in escrow pending the division of property. *See Schmidt,* 610 A.2d at 1375-76. In its discussion, the court noted that the appellant was in defiance of a trial court order and a fugitive from justice, avoiding enforcement of the contempt finding and capias outstanding against him. *See id.* at 1376. Under the circumstances, the court held that because the appellant

did not challenge the contempt finding or purge his contempt, he would not be allowed to contest the merits of the underlying case. *See id.* at 1377. Critical to its reasoning was that "[t]he processes of the appellate court are available to one who recognizes his responsibility to obey court orders while they remain in effect." *Id.*

Relying upon federal case law from both the Supreme Court and the United States Court of Appeals for the First Circuit, the defendant contends that we cannot dismiss his appeal. The authorities cited by the defendant are, however, inapposite. First, *Hovey v. Elliott,* 167 U.S. 409 (1897), and *McVeigh v. United States,* 78 U.S. 259 (1870), did not address an appellate court's authority to dismiss an appeal of a party found in contempt of a trial court order. Rather, these cases addressed situations in which the trial court prevented a defendant, because of his status, from defending initially against claims brought against him. *See Hovey,* 167 U.S. at 411-12 (defendant found in contempt not allowed to defend against action); *McVeigh,* 78 U.S. at 266-67 (alien enemy of the United States not allowed to defend against libel of information seeking to reach his property because he was a rebel residing behind confederate lines). It was the initial deprivation of the defendant's right to defend himself, akin to due process, which was at issue in *McVeigh* and *Hovey*.

In *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.,* 960 F.2d 1080, 1097 (1st Cir. 1992), the United States Court of Appeals for the First Circuit did address the issue of whether a party's appeal must be dismissed because of its failure to obey a trial court order and failure to purge its contempt in the trial court. That case is factually distinguishable, however,

because the appellant was challenging the contempt ruling as well as the underlying decree. *See id.* at 1084, 1097-98.

A party who is in contempt of a trial court order cannot be permitted to adjudicate the merits of a case from which the contempt finding arose if the contempt is neither purged nor challenged on appeal. "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state." *MacPherson v. MacPherson,* 89 P.2d 382, 385 (Cal. 1939). We hold that in limited circumstances, an appeal in a civil case may be dismissed if the appellant has failed to comply with an order of the trial court that relates directly to the issues raised by the appellant on appeal, and the issue of contempt is not being appealed. When a party has consciously and deliberately disregarded a trial court order that has direct bearing upon an issue for which that party seeks relief, we may exercise our discretion to dismiss.

We stress that our decision today should not be interpreted as preventing a party who has been found in contempt from appealing the contempt ruling as well as the merits of the underlying case. Nor should it be read as encouraging interlocutory appeals of contempt rulings.

In this case, the defendant refused to comply with various trial court orders, including one to execute consent forms for the purpose of ascertaining his financial status. While he disputes whether the trial court ever found him in contempt for failing to execute these waivers, our review of the record indicates that he was found in contempt. Further, the defendant, while in contempt, did not attend the final divorce hearings. To date, the trial court

has not made a finding that the defendant has purged that contempt. His actions overall reflect a pattern of conduct intended to thwart an equitable distribution of the marital estate to the detriment of the plaintiff.

We stated clearly in *DeMauro I* that "[h]aving asserted his privilege, the defendant cannot be heard to argue that the disposition [of the marital property] was unequal when the defendant has effectively prevented the trial court from being able to determine whether the disposition was in fact equal or not." *Id.* at 889 (brackets and ellipsis omitted). In the present appeal, the defendant attempts to challenge precisely the outcome that he could have prevented, for it is his contempt for failing to execute authorizations that is potentially dispositive of the issue about which he complains. Given these circumstances, we will not permit the defendant to seek the assistance of the judicial process while he refuses to comply with its orders. Accordingly, we conclude that the defendant has forfeited the right to appellate review of the merits in this case and dismiss his appeal.

Appeal dismissed.

NADEAU and DUGGAN, JJ., concurred.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2000-147, *Annette B. DeMauro v. Joseph M. DeMauro*, the court upon March 6, 2002, made the following order:

The defendant's motion to supplement the appellate record is granted with respect to exhibits A, B and C, and is denied with respect to exhibit D.

Nadeau, Dalianis and Duggan, JJ., concurred.

Eileen Fox,
Clerk

Date of clerk's notice of decision: March 8, 2002
Distribution:
Clerk, Rockingham County Superior Court #94-M-0173
Heidi E. Shealy, Esquire
Stephen L. Tober, Esquire
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Bernard Dwork, Esquire
Kathleen M. Morrissey, Esquire
File

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2000-147, *Annette B. DeMauro v. Joseph M. DeMauro*, the court upon September 27, 2001, made the following order:

The case is remanded to the superior court for the limited purpose of considering the plaintiff's emergency request to authorize borrowing to pay back support.

Ruling upon the plaintiff's motion to dismiss is deferred. The parties may address the motion during oral argument.

This order is entered by a single justice (Duggan, J.). *See* Rule 1.

Howard J. Zibel,
Clerk

Date of clerk's notice of decision: September 27, 2001

Distribution:
Rockingham County Superior Court #94-M-0173
Heidi E. Shealy, Esquire
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Bernard Dwork, Esquire
Kathleen M. Morrissey, Esquire
Honorable Walter L. Murphy
File

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2000-147, *Annette B. DeMauro v. Joseph M. DeMauro*, the court upon July 11, 2000, made the following order:

Plaintiff's motion for summary affirmance and motion to dismiss appeal are denied.

Case is accepted for briefing and oral argument.

On or before January 19, 2001, defendant shall determine the participation status of each party and shall so inform this court. Defendant shall contact the Rockingham County Superior Court to ascertain the cost of preparation of copies of the transcript *for each party of record.* The defendant shall provide a certified copy of the transcript to the parties that he has determined will be participating in this case. The defendant shall pay the cost for preparation of the transcript to the clerk of the Rockingham County Superior Court on or before January 19, 2001, or the appeal will be deemed waived. Refer to Rule 15.

Upon receipt of the required advance payment of the estimated cost, the clerk of the trial court shall notify the court reporter to proceed with the transcript and shall notify the clerk of the supreme court that the court reporter has been so notified. If the clerk of the trial court does not timely receive the required advance payment, the clerk of the trial court shall so notify the clerk of the supreme court.

On or before January 19, 2001, defendant shall arrange for the transfer of the originals of the transcripts

to the supreme court. Defendant shall also arrange for the transfer of the copies of the transcript to the parties.

Nadeau and Dalianis, JJ., participated; Groff, Mangones, and Mohl, JJ., superior court justices, specially assigned under RSA 490:3, participated.

Howard J. Zibel,
Clerk

Date of clerk's notice of decision: January 4, 2001

Distribution:
Clerk, Rockingham County Superior Court 94-M-0173
Noreen Bean, Executive Secretary

In Case No. 2000-147, *Annette B. DeMauro v. Joseph M. DeMauro*, the court upon July 11, 2000, made the following order:

Page Two of Two

Distribution continued:
Stenographer: Renee O'Barton
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Sherri Kluesener, Supreme Court
Marcia McCormack, Supreme Court
File

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA1 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, First Circuit.

Annette B. DeMAURO, Appellant,

v.

Joseph DeMAURO, Edward Martin, DeMauro Co., Inc., Nicholas DeMauro, Tri-Area Development Co., Inc, and Joan Martin, Defendants, Appellees.

No. 99-1589.

Feb. 16, 2000.

S. James Boumil, for appellant.

Kathleen M. Morrissey, Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP with whom *Bernard A. Dwork, Kevin P. Scanlon*, Barron & Stadfelfd [sic], P.C., *Richard L. Fox*, and Carragher & Fox, were on brief, for appellees.

Before *SELYA*, Circuit Judge, *BOWNES*, Senior Circuit Judge, and *BOUDIN*, Circuit Judge.

BOWNES.

This case is related to a lengthy and bitterly fought divorce proceeding in New Hampshire between plaintiff Annette B. DeMauro and the principal defendant, Joseph

DeMauro.[1] It would appear that the divorce proceedings were precipitated when Annette discovered that Joseph was having an affair with the household maid. As far as we know, there has been no final decree in the divorce proceeding.

Plaintiff filed a six count amended complaint against her husband and the five other named defendants. Count One alleged violations of 18 U.S.C. §§ 1961-1968 (1982), the Racketeer Influenced and Corrupt Organizations Act (RICO). Count Two alleged conspiracy by the defendants under RICO.

The balance of the complaint alleged pendent state-law claims. Count Three alleged intentional infliction of emotional distress. Count Four alleged breach of fiduciary duty. Count Five alleged illegal telephonic recordings. Count Six alleged fraudulent conveyances.

After a lengthy hearing, the district court dismissed the two RICO counts for failure to state a cause of action. It stated, *inter alia:*

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[1] This is the second time that this case has been before us. The previous case, reported at 115 F.3d 94 (1st Cir.1997), was an appeal from a *Burford* abstention order issued by the district court. We vacated the order and remanded for further proceedings. We pointed out that abstention was "a possible but not a mechanical answer." *Id.* at 100. We also stated:

The district court has no obligation to pursue the abstention issue at all if the matter can be disposed of more appropriately on other grounds. Motions to dismiss have been made for lack of standing . . . for failure to plead fraud with particularity, and for other reasons. Possibly, further exploration will reveal that Annette has no standing as to *any* of the property in question. In all events, the order in which to consider issues is a matter for the district judge. *Id.*

> What I cannot find is a pattern of racketeering activity as defined by the RICO statute. Specifically, what I cannot find what the plaintiff claims to be a violation of the wire fraud and mail fraud statutes. [W]here this complaint is deficient is that it does not allege false or fraudulent pretenses, representations or promises, and to the extent that it does so allege, those allegations are not made with the specificity required by Rule 9(b).

The court declined to exercise supplemental jurisdiction with respect to Counts Three, Four, and Six. The court, *sua sponte,* dismissed the federal claim purported to be asserted in Count Five (entitled "Illegal Telephone Recordings") and declined to exercise jurisdiction over any state claim purported to be stated in that count. For the following reasons, we affirm, but on somewhat different grounds, as we can do. *See Acushnet Co. v. Mohasco Co.,* 191 F.3d 69, 76 (1st Cir.1999); *see also Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston,* 184 F.3d 88, 97 (1st Cir.1999).

I. Standard of Review

We review the district court's decision to dismiss Counts One and Two of the complaint de novo. *See Doyle v. Hasbro, Inc.,* 103 F.3d 186, 190 (1st Cir.1996). We accept as true "all well-pleaded factual averments and indulg[e] all reasonable inferences in the plaintiff's favor." *Id.* The district court's order of dismissal may be affirmed only if the "facts alleged, taken as true, do not justify recovery." *Id.*

II. The Elements of a RICO Claim

RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering. . . . " 18 U.S.C. § 1962(c). Section 1964(c) provides that a private party injured in his business or property as a result of a RICO violation may pursue a civil claim for treble damages. Although RICO is silent about what limitations period governs the filing of civil RICO claims, the Supreme Court has held that civil RICO actions are subject to a four-year limitations period. *See Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 183, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997)(holding that civil RICO claims are subject to a four-year limitation period contained in § 4B of the Clayton Act – the statute of limitations that governs private civil antitrust actions seeking treble damages).

For a civil RICO claim to survive a motion to dismiss, the complaint must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 496 (1985); *see also Doyle,* 103 F.3d at 190. "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima,* 473 U.S. at 496.

The first requirement that the plaintiff must establish in order to survive a motion to dismiss is the existence of an enterprise. *See Ahmed v. Rosenblatt,* 118 F.3d 886, 889 (1st Cir.1997). An "enterprise includes any individual, partnership, corporation, association, or other legal entity,

and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Once the plaintiff establishes the existence of an enterprise, she must allege a pattern of racketeering activity. *See McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 788 (1st Cir.1990) ("Establishing a RICO violation under either section 1962(a) or section 1962(c), requires proof of a 'pattern of racketeering activity'. . . . "). A pattern of racketeering activity involves at least two predicate acts, the second of which must occur within 10 years of the first. *See* 18 U.S.C. § 1961(5); *see also Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30 (1st Cir.1987). This court has stated that "[i]t is not enough for a plaintiff to file a RICO action, chant the statutory mantra, and leave the identification of predicate acts to the time of trial." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir.1991). Predicate acts are acts indictable under certain specified laws, including the mail and wire fraud statutes. *See McEvoy,* 904 F.2d at 788.

It is well-settled in this circuit that when a plaintiff relies on predicate acts containing fraud, they are subject to Rule 9(b)'s heightened pleading requirement. *See New England Data Services, Inc. v. Becher,* 829 F.2d 286, 288 (1st Cir.1987) (stating that Rule 9(b) has been strictly applied where fraud lies at the core of the claim). Federal Rule of Civil Procedure 9(b) states that fraud must be pled with particularity. Thus, in order to survive a motion to dismiss, the plaintiff must state the time, place, and content of the alleged misrepresentation perpetuating that fraud. *See Ahmed,* 118 F.3d at 889.

It is also well-established that a single criminal event does not constitute a pattern of racketeering activity. *See*

Apparel Art Int'l, Inc., v. Jacobson, 967 F.2d 720, 722 (1st Cir.1992); *see also H.J. Inc. v. Northwastern* [sic] *Bell Telephone Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (finding "sporadic activity" does not form a pattern); *Roeder,* 814 F.2d at 31 (holding that a single bribe paid in three installments, each constituting a mail fraud violation, did not make out a "pattern").

Adequately alleging two predicate acts, although necessary, is not sufficient to establish a "pattern of racketeering activity." "The use of the word 'requires' – as opposed to 'means' – in § 1651(5) indicates that alleging two acts of mail fraud (or two or more other statutorily defined predicate acts) is necessary but not sufficient to establish a pattern of racketeering activity." *Fleet Credit Corp. v. Sion,* 893 F.2d 441, 444 (1st Cir.1990); *see also H.J. Inc.,* 492 U.S. at 237; *Roeder,* 814 F.2d at 30 ("It is not enough that defendants may have engaged in racketeering 'acts'; these acts must constitute a 'pattern of racketeering activity' as construed under RICO for there to be liability.").

Following the Supreme Court's lead in *H.J., Inc.,* 492 U.S. at 238, we have held that a plaintiff seeking to establish a "pattern of racketeering activity" must establish that the "predicate acts are related and that they amount to or pose the threat of continued criminal activity (the 'continuity' requirement)." *Ahmed,* 118 F.3d at 889; *see also Fleet,* 893 F.2d at 444 (holding that a pattern of racketeering activity is formed if (a) the predicate acts were related, and (b) the predicate acts amount to, or pose a threat of, continued criminal activity); *Roeder,* 814 F.2d at 30 ("The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence.").

To fulfill the relatedness requirement, the predicate acts must have the "same or similar purposes, participants, victims, or methods, or otherwise be interrelated by distinguishing characteristics and not be isolated events." *Ahmed,* 118 F.3d at 889; *see also Fleet,* 893 F.2d at 445. In establishing the continuity prong, the plaintiff must show "either that the related predicates 'amounted to' continued criminal activity or that there was, even though the predicate acts did not span a significant time, a 'threat' or realistic prospect of continued activity in time yet to come." *Ahmed,* 118 F.3d at 839 (quoting *Feinstein,* 942 F.2d at 45).

The Supreme Court in *H.J. Inc.,* 492 U.S. at 241, held that predicate acts amount to continued activity when they evince a "closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." The Court has defined this as:

> a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

Id. at 242.

We have previously stated that a threat of continued criminal activity for purposes of RICO is not established "merely by demonstrating that the [defendants'] acts of common law fraud were a regular way of conducting their ongoing businesses. Rather, the [plaintiff] must demonstrate that the predicate acts . . . were a regular way of conducting the ongoing businesses." *Fleet,* 893 F.2d at 448.

With these tenets in mind, we turn to the plaintiff's complaint.

III. Analysis

Paragraphs 12 through 17 of Count One of the complaint allege in effect:

Paragraph 12: At the time of their marriage Annette and Joseph had few assets. Joseph was "in effect bankrupt." In 1975 they left Japan and moved to the Middle East where Joseph sought opportunities to engage in heavy construction; "an opportunity was found."

Paragraph 13: Before taking Annette to the "extreme hardship" of the Middle East, Joseph promised Annette that they would "share and share alike" in any success they achieved.

Paragraph 14: Joseph established a bank account for Annette and himself, first in the Middle East, and then in Switzerland. Joseph deposited the profits from the business into "their" account to pay their expenses and "apparently to induce her to believe that he was maintaining accounts in both names as promised." Joseph induced Annette to believe, "by his repeated promises, [that] they would share equally and hold" money earned in the Middle East for their "mutual benefit and control."

Paragraph 15: Annette enhanced the success of the business by actually working in the office with Joseph, by arranging and providing entertainment and social activities for employees and customers, by providing counseling and psychological assistance to employees of the company and their families, and by sharing the physical risk of the location.

Paragraph 16: Joseph, either directly or indirectly, established bank accounts in foreign jurisdictions in the name of Nicholas DeMauro. Into those accounts, Joseph deposited or caused to be deposited profits from the business and joint assets, thus concealing the assets from Annette. This scheme continues to this day.

Paragraph 17: Over the years the business earned millions of dollars by Joseph's own accounting; substantial money was earned on these profits. Annette did not object to the receipt and management of these funds by Joseph because he represented that he was taking care of their monetary affairs and was investing for both of them.

None of the allegations in paragraphs 12 through 17 show an enterprise engaged in a pattern of racketeering activity. Concealment of assets by a husband from a wife is reprehensible and may be a crime under certain circumstances but that does not render it a pattern of racketeering activity perpetuated through an enterprise. Moreover, paragraph 17 states that "Annette did not object to the management of these funds by Joseph."

Paragraphs 18 through 21 allege in effect:

Paragraph 18: Starting in 1976, Joseph started a pattern of racketeering activity "known as the RICO conduct" which continues to this day. This pattern of activity was designed to conceal from Annette the assets accumulated from the business and to convince Annette and others that the assets were being held jointly while actually Joseph defrauded her and misled her and others as to their nature, location, extent and existence.

Paragraph 19: Joseph conspired with the other defendants in a continuous enterprise continuing to this day.

The corporate defendants were used as shams to further the RICO enterprise. All the named personal defendants were agents and co-conspirators of Joseph.

Paragraph 20: Joseph, acting in concert with the other defendants from time to time, by means of "false pretenses, representations and 'devices' established bank and investment accounts in Switzerland, Middle East, France, Liechtenstein, several states of the United States." Most of these accounts were established under the names of "straws, sham trusts and phony foundations." This was all done to conceal the assets from Annette and other creditors. Thus, assets of Annette, including assets from her first marriage, were taken from her and concealed.

Paragraph 21: In doing the things alleged in Paragraph 20, Joseph made "extensive use of the wires and mails of the United States."

Paragraphs 18 through 21 fail to plead fraud with particularity. Paragraph 18 uses the words "pattern of racketeering activity," "RICO conduct," and "defrauded," but does not specify as to when the activity took place and what was done. Paragraphs 19, 20, and 21, similarly use broad conclusory language. The last sentence of paragraph 20 does not state either the value of Annette's assets or of what they consisted. We do not doubt that Joseph made "extensive use of the wires and mails of the United States" but that is only one factor to consider in determining the validity of the complaint. As we have stated previously, to plead fraud with particularity pursuant to Rule 9(b), a plaintiff must state the time, place, and content of the alleged misrepresentation perpetuating the fraud. Annette fails to do this.

Paragraphs 22 through 28 allege in effect:

Paragraph 22: Joseph caused property known as 2595 Ocean Blvd., Rye Beach, NH to be placed in the name of the "Klaidonis Foundation" despite the fact that a Purchase and Sale Agreement for the property had been executed in the names of Annette and Joseph. Annette had not been informed of the change in ownership of the property.

Paragraph 23: In operating the Klaidonis Foundation, Joseph used the wires and mails of the United States to transfer "in excess of $2 million in interstate commerce in furtherance of this scheme." The existence of the Klaidonis Foundation was concealed from Annette and only discovered recently. The existence of this sham foundation was only discovered after the divorce action commenced.

Paragraph 24: Exhibit A is a true and accurate copy of the deposition of the Honorable John Maher (now a judge) concerning the purchase of the 2595 Ocean Blvd. property. It summarizes the deposition testimony of Judge Maher in four subparagraphs.

Paragraph 25: Joseph induced Judge Maher to place the property in the name of the Klaidonis Foundation. This inducement was obtained by fraud on the part of Joseph.

Paragraph 26: Since January 13, 1988, Joseph has used the wires and mails of the United States to "contact, instruct and compensate his foreign agents who hold and maintain the Klaidonis Foundation for his benefit." This is part of a plan and scheme through an illegal enterprise which continues to this day.

Paragraph 27: Joseph has taken the position and has instructed his attorneys and agents to take the false position that he has no interest in or knowledge of the Klaidonis Foundation. Joseph has an outstanding warrant against him. Joseph makes constant threats to Annette to the effect that he will abandon any interest in the Rye Beach property and let his creditors take it and "auction Annette's interest in the property." This is to increase Joseph's pressure on Annette and pressure her to settle all outstanding cases against him, including this one, on his own terms.

Paragraph 28: On November 16, 1988, Joseph signed a building permit application listing himself as owner of the property. This shows that the Klaidonis Foundation is a mere straw.

We think that paragraphs 22 through 28, construed most favorably to Annette, set forth sufficient facts to allege one RICO predicate act. Although it is a close call, we think the allegations of fraud meet the specificity requirement of Fed.R.Civ.P. 9(b). As we construe these allegations, they state that at the time of purchasing the property described therein, Joseph led Annette to believe that the title to the real estate would be in both their names. We construe this to allege that there was a deliberate misrepresentation by Joseph on which Annette relied and that Joseph defrauded her by placing the property in the name of the Klaidonis Foundation, which was owned and controlled by Joseph.

Paragraphs 29 through 32 bring another foundation into the picture. They allege in effect:

Paragraph 29: Joseph established the Redonia Foundation as a sham entity. Joseph used the mails and wires

of the United States to deposit, in five named banks and other banks, "hundreds of thousands of dollars" which he used to make, improve and conceal the ownership of investments here in the U.S.

Paragraph 30: Twenty-five specific examples of wire transfers of money to a Luxembourg Bank, Credit Swisse Bank, and Union Bank-Switzerland are stated. The money was hidden in the "Redonia Foundation." This is part of Joseph's scheme and artifice to defraud Annette "and as an integral part of defendant's RICO activity."

Paragraph 31: There were numerous other wire transfers "siphoning off" Annette's assets "from the foreign bank accounts to which [Joseph] had removed them to Defendant DeMauro Co., and each of the other defendants."

Paragraph 32: Nicholas DeMauro knew that the Redonia Foundation was a sham used by Joseph to conceal assets in offshore entities and then wire them into the United States.

None of these paragraphs state that a fraud was committed against Annette with the specificity required by Fed.R.Civ.P. 9(b). Although Annette has alleged the use of the U.S. mails and/or wires, by documenting some times and places of these transfers, she fails to allege the content of any misrepresentation.

The balance of the complaint fails to state a second predicate act, which is required for a RICO violation. Some of the remaining paragraphs repeat prior allegations and others are window dressing.

Paragraphs 33 through 66 allege in effect:

Paragraph 33: Joseph, Nicholas DeMauro, Edward Martin, DeMauro Co ., Inc. and Tri-Area Development Co., Inc., have conspired to place in excess of a million dollars into defendant corporations. There are nine separate sub-paragraphs detailing how this conspiracy was carried out.

Paragraph 34: Joseph used the wires and mails to deposit money in the Lowell Five Cents Savings Bank to acquire and maintain properties which he concealed from Annette.

Paragraph 35: Identification of some of the concealed properties and the names of those holding the properties are stated. The properties have no mortgages and their estimated value is "hundreds of thousands of dollars."

Paragraph 36: Most, if not all, of the money used to acquire the properties described in Paragraph 35 is a joint asset.

Paragraph 37: Joseph and Nicholas DeMauro acquired property in Tyngsborough, MA with Annette's money. This property is in the names of DeMauro Co., Inc. and Tri-Area Development Co., Inc.

Paragraph 38: There were no mortgages on the Tyngsborough properties, and DeMauro Co., Inc. and Tri-Area Development Co., Inc., the named owners, had no viable source of credit, but construction costing hundreds of thousands of dollars is being done. Joseph has "wire transferred" money to both corporations "in furtherance of the scheme." There are seven sub-paragraphs detailing a purported money laundering scheme involving $60,000.

Paragraph 39: Joseph makes multiple phone calls to Annette telling her that he has hidden her assets and she will get nothing. The amount of Annette's money so concealed is "well in excess of ten million dollars."

Paragraph 40: Joseph has been using DeMauro Co., Inc. and Tri-Area Development Co., Inc. to provide a means of support for his two sons, Nicholas and Michael. The sons are assisting him in conducting his racketeering activity and fraud.

Paragraph 41: The payments to Joseph's sons deprived Annette of money and property due her.

Paragraph 42: DeMauro Co., Inc. has provided assets to Joseph's brother-in-law Edward Martin and his sister Joan Martin by listing on its financial statements a false account payable to Edward Martin in the amount of $135,000.

Paragraph 43: More details are laid out about the $135,000 referred to in paragraph 42.

Paragraph 44: Assets of more than $500,000 have been fraudulently transferred to Edward and Joan Martin.

Paragraph 45: Joseph and some other defendants have participated in money laundering.

Paragraph 46: Joseph has used other persons "innocent and otherwise" to attend real estate auctions and bid on property for him and he concealed such purchases from Annette.

Paragraph 47: Property in the name of Tri-Area Development Co., Inc. as described by deed in Exhibit L is

an example of Joseph acquiring property from marital assets and concealing it in the name of another.

Paragraph 48: Joseph and the other defendants conspired to hide Annette's assets, thus depriving her of millions of dollars.

Paragraph 49: Joseph falsely represented to the Town of Rye, NH that the Klaidonis Foundation is the owner of 2595 Ocean Blvd. in Rye, NH. Joseph invested hundreds of thousands of dollars, obtained from abroad, in renovating the property.

Paragraph 50: Joseph has used the wire and mails to conceal assets and siphon off assets belonging to Annette.

Paragraph 51: Joseph, working with Nicholas DeMauro, submitted false and misleading loan applications to FDIC insured lending institutions.

Paragraph 52: Specific threats, intimidations, harassment and extortion of Annette by Joseph are described.

Paragraph 53: The allegations in paragraph 52 violate the laws of New Hampshire and the United States.

Paragraph 54: Joseph has secretly tape-recorded conversations with Annette and played portions of the tapes to third parties.

Paragraph 55: Joseph has used a law firm in West Palm Beach, Florida to pay bills and conceal from Annette the origin of his funds.

Paragraph 55(a): Annette and Joseph, through a trust established by Joseph, own property in Manalapan, Florida. Five sub-paragraphs detail how Joseph has

extorted Annette and misused the property causing her damages in excess of $50,000.

Paragraph 56: Joseph misused credit cards in Annette's name to purchase goods.

Paragraph 57: Joseph has falsely registered at hotels with other women posing as Annette.

Paragraph 58: Joseph purchased a yacht with another person and then deliberately damaged it so that he could claim it did not meet contract specifications. A judgment has been entered against Joseph, threatening Annette in the amount of many hundreds of thousands of dollars.

Paragraph 59: Joseph has, within the last two years, furthered a conspiracy to defraud and extort Annette. There are four sub-paragraphs of specifications. We have read the sub-paragraphs carefully and they neither singly nor in the aggregate allege facts sufficient to prove a present conspiracy to defraud and extort Annette.

Paragraph 60: The defendants have repeatedly used wires, mails, and other means of interstate commerce to violate RICO.

Paragraph 61: As the result of Joseph's illegal activities, Annette has been unable to locate and control her assets.

Paragraph 62: Nicholas DeMauro has admitted in a public document that the stock of DeMauro Co., Inc. is owned by Joseph. Three sub-paragraphs from a pre- trial memorandum filed in Massachusetts Probate Court follow.

Paragraph 63: Nicholas DeMauro is causing valuable property to be deeded to him by DeMauro Co., Inc. in fraud of Annette's rights.

Paragraph 64: Joseph, during his deposition, invoked the 5th Amendment privilege "to virtually every question."

There is no paragraph numbered 65.

Paragraph 66: Joseph has stolen private papers of Annette and refuses to return them.

Paragraph 66(a) states that the complaint does *not* allege: that Joseph is guilty of income tax evasion, has received any illegally paid wages, or that any wages he has earned from his own employment are from any criminal enterprise. The final sub-paragraph (d) states that the purpose of this statement is because Joseph has invoked the fifth amendment in his depositions without any basis for doing so.

Although the allegations described in paragraphs 33 through 66 recite serious crimes and reprehensible conduct, none of them, singly or consolidated, set forth a second predicate act sufficient to meet the legal requirements for a RICO violation.

IV. Conclusion

Paragraphs 12 through 17 do not show an enterprise engaged in a pattern of racketeering activity. Paragraphs 18 through 21 fail to plead fraud with particularity. Paragraphs 22 through 28 set forth sufficient facts to allege one predicate act. Paragraphs 29 through 32 do not state that a fraud was committed against Annette with the specificity required by Rule 9(b). Paragraphs 33 through

66 fail to set forth a second predicate act. Therefore, we affirm the district court's ruling to dismiss Counts One and Two of the complaint.

We point out that our affirmance of the dismissal does not leave Annette without other remedies. As noted in our prior opinion, she has obtained attachments in state court totaling 33 million dollars in property owned partly or solely by Joseph. *See DeMauro,* 115 F.3d at 97.

We find no merit in plaintiff's objections to the district court's dismissal of the other counts in the complaint. *See* 28 U .S.C. § 1367(c) (1990).

Judgment affirmed.

215 F.3d 1311 (Table), 2000 WL 231255 (1st Cir.(Mass.)), RICO Bus.Disp.Guide 9842 Unpublished Disposition

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

Annette B. DeMauro

v.

Joseph M. DeMauro

94-M-173

ORDER

A Final Domestic Pretrial Conference in the above case scheduled for trial on the merits commencing November 15, 1999, was conducted before the undersigned on November 2, 1999. Appearing for the plaintiff were Stephen Tober and James Boumil, Esquires; the defendant was represented by Edwinna Vanderzanden and Lawrence Edelman, Esquires. Also in attendance were the plaintiff and the court-appointed Temporary Receiver, John P. McGee, Esquire. The defendant failed to appear notwithstanding the court's October 13, 1999 notice that his failure to do so "may result in a default being entered and the matter heard uncontested" (Doc.#355).

There were a number of pending motions on which the court makes the following orders.

Defendant's Motion to Excuse the defendant's appearance filed October 28, 1999 is DENIED for the reasons set forth in the plaintiff's objection thereto and set forth in the record of hearing.

Plaintiff's Motion for Default made orally for defendant's failure to attend the conference is likewise DENIED without prejudice to the court's reconsideration should defendant fail to appear personally at trial on the merits as hereinafter set forth.

Defendant's Motion for Pro Hac Vice Admission of Kathleen M. Morrissey (Doc.#351) is DENIED.

Defendant's Motion to compel Discovery (Doc.#356) is GRANTED but only to the extent that the plaintiff has no objection thereto as follows: Responses to Questions 5 and 7 of the Second Set of Interrogatories will be furnished defendant's counsel no later than November 10, 1999; in all other respects the motion is DENIED for the reasons set forth in the plaintiff's objection thereto (Doc.#357).

Plaintiff's motion to Disclose Expert Witness (Doc.#358) is GRANTED for the reasons set forth therein, upon the condition that plaintiff shall make the witness available for discovery deposition prior to his court testimony.

The Temporary Receiver's Motion to Excuse Presence at Trial is GRANTED as is his Motion for Payment of Fees; the issue of the appropriate party (ies) to be responsible for the payment of the receiver's fees and expenses is deferred pending hearing on the merits.

The following additional motions were filed by the defendant to which the plaintiff had not yet had the opportunity to respond. On the basis of the content thereof, and the objections which have since been filed, the following rulings are made:

For the reasons set forth in the plaintiff's objection thereto filed November 4, 1999, the Motion in Limine to Exclude Evidence of Defendant's Financial Condition filed November 1, 1999 is DENIED.

For the reasons set forth in the plaintiff's objection thereto filed this date, the Motion in Limine Addressing

the Issue of Admission of Facts filed November 2, 19999 [sic] is DENIED.

The parties' counsel have indicated that they expect a number of additional pretrial motions and objections to be filed including Motions to Quash Subpoena. To the extent necessary, the court will schedule a telephonic hearing relative thereto. Otherwise, they will be addressed on the first day of trial. It is noted that the court has indicated that any request that current counsel be called as witnesses will likely not be permitted absent a clear showing of absolute necessity. It is likewise noted that the court will, upon request by either party, take judicial notice of the contents of the court's files in this matter.

Counsel should also note that recent court notices sent to the Co-Respondent Brenda Gilman at her last known address have been returned to the court as undeliverable.

The plaintiff has filed a Proposed Decree, List of Trial Exhibits, a List of Witnesses, and a Financial Affidavit. The Defendant has filed a Witness and Exhibit List and a Financial Affidavit in which, for the reasons he has previously set forth, for declining to set forth any information relative to his finances.

Defendant is ORDERED to appear in person for hearing on the merits as currently scheduled. Because his counsel have declined to assure the court that he will appear, it is unlikely that he will do so. His failure to appear will result in his default, as a result of which all factual assertions contained in the plaintiff's pleadings shall be taken **pro confesso**. Trial will then proceed to the issue of alimony and property division. *See, Douglas v. Douglas*, 143 N.H. (Decided March 10, 1999).

It is now anticipated that trial will be no more than three (3) days in length and will commence on November 15, 1999 at 10 a.m. and will continue on November 16 and November 17 unless earlier concluded.

On November 15, 1999 at 9:30 am the court shall be furnished with any changes in the lists submitted this date of the names and addresses of all witnesses whose testimony will be presented at trial. No additions thereto or deletions therefrom shall be permitted except upon order of the court for good cause shown.

There shall also be presented at that time to the Court Monitor for marking all exhibits which are intended to be produced during the course of trial. Any exhibits which the parties are unable to agree upon shall be marked for identification and shall be subject to a ruling as to their admissibility either prior to, or during, the trial. No exhibits shall be admissible at trial unless they are so marked absent an order of the court for good cause shown.

Trial of the case shall be conducted in accordance with the terms of this order except as otherwise ordered by the undersigned for good cause shown.

So Ordered.

November 8, 1999 /s/ Walter L. Murphy
Walter L. Murphy
Presiding Justice

712 A.2d 623

Supreme Court of New Hampshire.

Annette B. DeMAURO

v.

Joseph M. DeMAURO.

No. 97-136.

June 16, 1998.
Rehearing Denied July 31, 1998.

Tober Law Offices, P.A., Portsmouth (*Stephen L. Tober*, on the brief and orally), and *S. James Boumil*, Lowell, MA, on the brief, for plaintiff.

Sanders & McDermott, P.L.L.C., Hampton (*Lawrence M. Edelman*, on the brief and orally), for defendant.

HORTON, Justice.

The defendant, Joseph M. DeMauro, appeals a decision of the Superior Court (*McHugh*, J.) ruling that he improperly asserted his State and federal privilege against self-incrimination. We reverse and remand.

In February 1994, the plaintiff, Annette B. DeMauro, filed a libel for divorce against the defendant. In the libel she alleged that the defendant had engaged in a systematic effort to conceal assets accumulated during their marriage by creating and fraudulently using trusts, foundations, sham corporations, off shore accounts, straws and other entities. The plaintiff also filed the required Rule 158 support affidavit. *See Super. Ct. R. 158.* In March 1994, the plaintiff filed a motion to seal the record in the divorce proceeding on the basis that "[n]umerous allegations of both uncharged and unconvicted criminal behavior and activity . . . will be made within the pleadings."

The defendant contested the divorce and filed a counter-libel, but has never filed a completed *Rule 158* affidavit as required, and has refused to answer interrogatories and other requests for admissions concerning, *inter alia*, his employment, financial background, and living expenses. To date, the defendant has not provided any meaningful financial information to assist in determining an equitable property settlement. *See RSA 458:16-a*, II (1992).

The defendant first asserted his privilege against self-incrimination at a hearing in another civil case on September 18, 1995. The trial court noted that the defendant's assertion of privilege at that late date made "clear that [the defendant's] decision not to meaningfully comply with any past Court order regarding the divulging of his financial status and asset picture was made long before he realized he had a Fifth Amendment privilege." The court further noted that the defendant's refusal to comply was "based upon his pure contempt of this court and the judicial process."

On November 4, 1995, plaintiff's counsel provided the defendant a draft copy of a civil complaint to be filed in federal court alleging that the defendant had engaged in racketeering and numerous other unlawful activities, *see* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1951 (extortionate threats), 1961 (racketeering) (1994), intending to defraud the plaintiff. The plaintiff further alleged that the defendant had established bank accounts in Switzerland, Saudi Arabia, France, Liechtenstein, the United States, and "various and sundry other locations" in the names of "straws, sham trusts, shell companies and phony 'foundations,' all designed to conceal the location, extent, and existence of assets from [the plaintiff] and

persons with whom he did business." In January 1996, the defendant first filed a formal pleading asserting a blanket privilege against self-incrimination with respect to requests for admissions of facts and production of documents.

The plaintiff filed a complaint, similar to the draft complaint, in the United States District Court for the District of Massachusetts in May 1996. The complaint alleged a multitude of federal crimes spanning the twenty-plus years of the marriage, and continuing to the present day. The district court dismissed the suit because the allegations were similar to the pending divorce proceeding. The United States Court of Appeals for the First Circuit subsequently reversed the trial court, reinstated the suit, and permitted the district court to stay the proceedings pending a decision in the divorce case. *DeMauro v. DeMauro,* 115 F.3d 94, 99-100 (1st Cir.1997).

The Superior Court (*Gray*, J.) held the defendant in contempt and ordered him to make support payments to the plaintiff as provided in an earlier order, and to file a completed Rule 158 financial affidavit. The defendant appealed to this court in February 1996, and we directed the trial court to conduct a hearing pursuant to *Key Bank of Maine v. Latshaw,* 137 N.H. 665, 671, 633 A.2d 952, 956 (1993). *See DeMauro v. DeMauro,* No. 96-096 (N.H. April 19, 1996). In January 1997, the trial court conducted the hearing. To obtain the information sought on the Rule 158 affidavit, plaintiff's counsel posed over one hundred questions. The defendant refused to answer over seventy questions, claiming the privilege against self-incrimination. As his basis for asserting the privilege, the defendant cites the federal civil RICO complaint and claims that his answers to the questions could serve as a

link in the chain of evidence necessary to prosecute him for those offenses.

The trial court found that

> the defendant's attempt to broaden any privilege that he might have far beyond the holding in the lead case of *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 633 A.2d 952 (1993)[,] is wholly without merit. In the Court's view, *none* of the questions objected to by the defendant invoke any constitutional Fifth Amendment privilege that the defendant has.

The court also found that "the mere making of those allegations [in the civil RICO complaint] does not entitle the defendant to provide no useful information to the plaintiff and the divorce court so as to effectively prevent an equitable divorce from being granted."

The defendant argues on appeal that the trial court erred by: (1) "ruling that state and federal privileges against self-incrimination afforded [the defendant] *no* protection with respect to *any* of the questions posed concerning his financial activities during the last twenty (20) years"; and (2) holding that the defendant "had waived his constitutional privileges against self-incrimination when he made financial disclosures *prior to* receiving notice of the federal 'RICO' Complaint."

We address the defendant's claims first under the State Constitution, *State v. Ball,* 124 N.H. 226, 231, 471 A.2d 347, 350 (1983), and "[w]here, as in the instant case, the federal law is not more favorable to the defendant, we make no separate federal analysis." *State v. Davis,* 139 N.H. 185, 189, 650 A.2d 1386, 1388 (1994); *see State v.*

LaFountain, 138 N.H. 225, 227, 636 A.2d 1028, 1029 (1994).

Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall . . . be compelled to accuse or furnish evidence against himself." For a witness to invoke this privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *State v. Wheeler,* 128 N.H. 767, 771, 519 A.2d 289, 291 (1986) (quotation omitted). "The privilege against self-incrimination extends not only to answers that in themselves would support a conviction, but also to any information sought which would furnish a link in the chain of evidence needed to prosecute." *State v. O'Connell,* 131 N.H. 92, 94, 550 A.2d 747, 748 (1988). A party in a civil proceeding may assert the privilege to particular questions if the answer to the question could result in criminal liability. *See Latshaw,* 137 N.H. at 669-70, 633 A.2d at 955. "[W]hether a witness' claim of the privilege is justified is a decision which rests within the trial court's exercise of sound discretion." *O'Connell,* 131 N.H. at 94, 550 A.2d at 749.

The fact that the allegations in the divorce libel and the RICO complaint involve civil proceedings, rather than criminal proceedings, does not deprive a person of the privilege against self-incrimination. *Sevigny v. Burns,* 108 N.H. 95, 96-97, 227 A.2d 775, 777 (1967). The RICO allegations invoke federal statutes for which a defendant may incur both civil and criminal liability for the same activities. Although federal prosecution may be unlikely, the test is not whether prosecution will occur, but whether

prosecution *could* occur. *See Wyman v. DeGregory,* 100 N.H. 163, 165, 121 A.2d 805, 807 (1956).

At the *Latshaw* hearing in this case, plaintiff's counsel posed over one hundred questions to the defendant. With respect to at least seventy questions, the defendant asserted his rights against self-incrimination. The defendant asserted his privilege with respect to each question, rather than asserting a blanket privilege. *See O'Connell,* 131 N.H. at 94, 550 A.2d at 749; *Estate of Fisher v. C.I.R.,* 905 F.2d 645, 649 (2d Cir.1990). Colloquies between the judge and the attorneys during the hearing elucidated the basis and scope of the privilege asserted by the defendant.

The questions to which the defendant asserted his privilege fell into several categories. First, some questions did not implicate even a remote possibility of self-incrimination, even given the broad scope of the alleged criminal and civil wrongdoing asserted in the RICO complaint. These questions included, *inter alia,* "[d]o you own a set of golf clubs," "[d]id you at one time belong to the Abenaqui Golf Club," and "didn't Mr. Jasinski at one time own the Rye Beach property." Although the defendant erroneously asserted his privilege to these questions, the answers would not have provided the plaintiff with any additional information material to determining the size of the marital estate.

Second, the very nature of some questions indicates that the plaintiff has information regarding the scope and location of the defendant's financial dealings. Plaintiff's counsel asked the defendant whether he had a Bell Cell Visa card, a National Bank credit card, an AFT Universal Card, a current account at J.C. Penney, and two accounts

at Sears & Roebuck. Plaintiff's counsel then proffered a copy of the defendant's credit report to show that the defendant had accounts with these businesses. The plaintiff's knowledge is further evidenced by an extensive pleading entitled "Notice to Admit Facts." In this pleading she alleged that the defendant paid his personal bills out of a specified account at the Lowell Five Cents Savings Bank. She also alleged that the Klaidonis Foundation of Anwalts Buro, of Vadus, Liechtenstein was established at the request of Joseph M. DeMauro, a beneficiary, and holds record title to the property known as 2595 Ocean Blvd., Rye Beach, N.H. In addition, "Joseph M. DeMauro now or formerly had a bank and/or checking account at the Saudi British Bank in Saudi Arabia . . . [and an] account at Bank Indosuez of Lassane, Switzerland." With respect to these questions, the defendant properly asserted his privilege. Based on the allegations against the defendant, it is evident that the answers to these questions may not only serve as a link in the chain necessary to prosecute, but as direct evidence of the alleged wrongdoing.

Third, some questions sought testimony from the defendant to identify his signature on documents, or to identify and acknowledge that he viewed property tax bills or other documents. For example, the defendant was asked if he had ever seen a tax bill or a utility bill for a Florida property where the defendant resides, or if his signature appeared on a land trust deed. The defendant properly could assert his privilege to these questions because the answers might also serve as an evidentiary link in the chain necessary to prosecute. The plaintiff essentially requested the defendant to authenticate evidence she already has and seeks to use.

Finally, some questions sought information of the "fishing expedition" variety, including information about additional assets the plaintiff has no present information about. For example, the plaintiff asked the defendant whether he had a checking account in the United States. Plaintiff's counsel never followed this question with any information to indicate that the plaintiff had any specific knowledge on this issue. In light of the allegations contained in the divorce libel and the civil RICO complaint, the defendant may properly assert the privilege. The defendant is not obliged to provide the plaintiff with information concerning assets about which she has no information because any such assets could be a chain in the link, or actual evidence of the defendant's efforts to defraud the plaintiff.

The plaintiff argues that the defendant's assertion of privilege for the period covering the duration of the couple's marriage is inconsistent with our holding in *Latshaw*. Our holding in *Latshaw*, limiting the scope of the privilege to a narrow time frame, relates to the nature of the asserting party's alleged criminal activity. *Latshaw*, 137 N.H. at 671, 633 A.2d at 956. In *Latshaw*, the defendant was accused of having committed one instance of bank fraud on a particular date in June 1990. *Id.* at 667, 633 A.2d at 955. We held that forcing the defendant to disclose his financial status as described in his 1989 tax return "might furnish a link in the chain of evidence necessary to prosecute." *Id.* at 671, 633 A.2d at 956. We rejected the defendant's assertion of privilege with respect to his financial condition in August 1991 because "as the time increases between any two factual conditions, the connection between them becomes weaker and weaker." *Id.* *Latshaw*'s holding is tied to the causal link between two dates sufficiently far apart

that "evidence of . . . present insolvency would not furnish a link in the chain of evidence needed to prosecute him for lying on his June 1990 financial statement." *Id.*

In the divorce libel and in the collateral federal proceedings, the plaintiff alleged that the defendant had committed numerous state and federal offenses over a span of two decades. Based on the nature of the information sought in the divorce proceeding and the scope of the alleged criminal activities, the defendant could reasonably expect that any information he provided regarding his finances and business activities could be a link in the chain necessary to prosecute. *See Hoffman v. United States,* 341 U.S. 479, 488, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) (concluding that witness properly asserted privilege when foreseeable answers would forge links in the chain for federal prosecution); *cf. McPherson v. McPherson*, 112 Idaho 402, 732 P.2d 371, 375 (1987) (holding that party asserting privilege showed no "reasonable possibility of criminal prosecution").

Here, the broad allegations in the civil RICO complaint spanned several decades and alleged improper financial dealings and a host of federal and state crimes involving most, if not all, of the defendant's personal and marital assets. Thus, nearly any question answered by the defendant related to his financial or business dealings could possibly serve as a link in the chain of evidence, or could tend to incriminate him. "[W]hether a witness' claim of the privilege is justified is a decision which rests within the trial court's exercise of sound discretion." *O'Connell,* 131 N.H. at 94, 550 A.2d at 748; *see Janvrin v. Scammon,* 29 N.H. 280, 290 (1854). Insofar as the plaintiff's questions related to the defendant's financial activities during the time period at issue, we hold that the superior court

abused its discretion by requiring the defendant to answer them. It could not have been "perfectly clear, from a careful consideration of all the circumstances in the case," that the compelled answers "cannot possibly" have a tendency to incriminate the defendant. *Wheeler,* 128 N.H. at 771, 519 A.2d at 291 (quotation and emphases omitted). We conclude that the defendant properly asserted his privilege with respect to most questions. With respect to those questions to which the defendant improperly asserted the privilege, we do not see how the answers would be material to determining the equitable distribution of the marital estate.

We next address the defendant's assertion that the trial court erred in rejecting his privilege claim by finding that "[h]is haphazard and unreasonable invocation of any Fifth Amendment privilege to even the simplest questions smacks of nothing but pure obstructionism," and that his invocation of the privilege to virtually all questions related to his income, assets, or business activities amounted to a "blanket" assertion. Alternatively, the trial court found that "to the extent [the defendant] had a valid Fifth Amendment privilege to any information he gave previously, that privilege has been waived" by testifying in proceedings separate and distinct from the divorce.

The plaintiff argues that the defendant's "blanket privilege claims are unreasonable, and, thus, unjustified." The defendant, however, faced a dilemma. He risked being held in contempt by prematurely asserting the privilege at the *Latshaw* hearing; alternatively, he risked losing the privilege if he answered certain questions. *Cf. Rogers v. United States*, 340 U.S. 367, 378, 71 S.Ct. 438, 95 L.Ed. 344 (1951) (Black, J., dissenting). The defendant's steadfast refusal to answer even the most elementary questions

about his assets and finances persuades us that he did not intentionally relinquish or abandon his privilege against self-incrimination. *Cf. State v. Brodeur,* 126 N.H. 411, 416, 493 A.2d 1134, 1138 (1985) (quotation omitted) (concluding criminal defendant knowingly and intelligently waived his privilege). Although assertion of the privilege may ultimately be improper, a party who asserts the privilege against self-incrimination to individual questions, regardless of the number, is not deemed to have asserted a blanket privilege. *See O'Connell,* 131 N.H. at 94, 550 A.2d at 749.

Alternatively, the plaintiff argues that "this [d]efendant has voluntarily made prior sworn disclosures, and as a result has lost his privilege against self-incrimination." The defendant's testimony in any collateral proceeding did not constitute a waiver, however, because "waiver of the privilege is limited to the particular proceeding in which the witness appears." *State v. Roberts,* 136 N.H. 731, 745, 622 A.2d 1225, 1235 (1993) (quotation and brackets omitted); *see N.H. CONST. pt. I, art. 15.*

The defendant's assertion of the privilege did not leave the plaintiff or the trial court with an inaccurate assessment of his assets; it left them with no information to assess his financial status. *See Klein v. Harris,* 667 F.2d 274, 287-88 (2d Cir. 1981); *cf. Rogers,* 340 U.S. at 371 ("To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony"). *But cf. McCarthy v. Arndstein,* 262 U.S. 355, 359, 43 S.Ct. 562, 67 L.Ed. 1023 ("it makes no difference in the right of a witness to protection from incriminating himself that he has already answered in part, he being entitled to claim the privilege at any stage of the inquiry"), *reh'g granted,* 263 U.S. 676,

44 S.Ct. 33, 68 L.Ed. 501 (1923), *aff'd*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924). The defendant's assertion of his privilege may have concealed information, but it did not "mutilate[ ] the truth." *Garrelts v. Garrelts*, 101 Mich.App. 71, 300 N.W.2d 454, 456 (1980). Although the defendant's assertion frustrated the plaintiff and the trial court, we conclude that the defendant effectively asserted and did not waive his right against self-incrimination.

The defendant's assertion of privilege, however, cannot "be used as a means of preventing the orderly [resolution] of civil matters" and deprive the plaintiff of her rights. *State v. Cote,* 95 N.H. 108, 112, 58 A.2d 749, 752 (1948); *see generally* Heidt, *The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062 (1982); Kaminsky, *Preventing Unfair Use of the Privilege against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 Brook. L.Rev. 121 (1972). This case implicates two important policy considerations in direct conflict: equitable distribution of marital assets in a divorce proceeding and preservation of the privilege against self-incrimination. A careful balancing must occur between the defendant's privilege and the plaintiff's right to an equitable division of the marital assets. *Cf. State v. Lavallee,* 119 N.H. 207, 210, 400 A.2d 480, 482 (1979) (discussing that trial court must balance defendant's right to produce all favorable evidence and the witness's privilege); *Wansong v. Wansong*, 395 Mass. 154, 478 N.E.2d 1270, 1272 (discussing that trier of fact must weigh potential prejudice to other litigants and potential harm to the party claiming privilege), *cert. denied*, 474 U.S. 1014, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985).

The plaintiff may take reasonable steps to discover through alternate means the size and scope of the marital

estate. Unless a statute removes the privilege, *see Wyman v. DeGregory,* 101 N.H. 171, 174, 137 A.2d 512, 515 (1957) (immunity statute), *appeal dismissed,* 360 U.S. 717 (1959), the defendant need not answer any questions related to his alleged improper dealings with purported marital property. The trial court, however, may order the defendant to execute consent waivers consistent with those permitted in federal cases for discovery of assets. *See Doe v. United States,* 487 U.S. 201, 215-16, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988); *cf. Cormier,* 127 N.H. 253, 256, 499 A.2d 986, 988 (1985) (privilege against self-incrimination "applies only to evidence provided by a defendant that is of testimonial character"). Upon the appropriate showing by the plaintiff, *see Super. Ct. R. 35(c)(2); Robbins v. Kalwall Corp.,* 120 N.H. 451, 453, 417 A.2d 4, 5 (1980), the court may also order any entities the defendant has allegedly utilized to hide assets to produce appropriate records. *See State v. N.H. Retail Grocers Ass'n,* 115 N.H. 623, 626, 348 A.2d 360, 363 (1975).

Moreover, upon the completion of the plaintiff's discovery efforts, the trial court may fashion an equitable distribution based on all information then available and all reasonable inferences to be drawn therefrom. The court may also enter a decree for division of property subject to modification if additional assets are disclosed or discovered. *Calderwood v. Calderwood,* 114 N.H. 651, 654, 327 A.2d 704, 706 (1974), *appeal after remand,* 115 N.H. 550, 345 A.2d 166 (1975); *United States v. Mammoth Oil Co.,* 14 F.2d 705, 729 (8th Cir.1926) ("a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of [the defendant]"), *affirmed,* 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927). Having asserted his privilege, "[the

defendant] cannot be heard to argue that the disposition was unequal when [the defendant] has effectively prevented the trial court . . . from being able to determine whether the disposition was in fact equal or not. The only one who knows is [the defendant], and he is not talking." *Ross v. Ross,* 638 N.E.2d 1301, 1306 (Ind.Ct.App.1994).

Reversed and remanded.

BRODERICK, J., did not sit; the others concurred.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2000-147, *Annette B. DeMauro v. Joseph M. DeMauro*, the court on April 5, 2002, made the following order:

Defendant's motion for reconsideration is denied.

Nadeau, Dalianis and Duggan, JJ., concurred.

Eileen Fox,
Clerk

Date of clerk's notice of decision: April 8, 2002

Distribution:
Clerk, Rockingham County Superior Court 94-M-0173
Heidi E. Shealy, Esquire
Stephen L. Tober, Esquire
Edwinna C. Vanderzanden, Esquire
Kimberly J. Houghton, Esquire
Lawrence M. Edelman, Esquire
S. James Boumil, Esquire
Bernard Dwork, Esquire
Kathleen M. Morrissey, Esquire
W. Wright Danenbarger, Esquire
Donald Kennedy, Esquire
John P. McGee, Esquire
Charles Solms, Esquire
Honorable Walter L. Murphy
Irene Dalbec Supreme Court
Laura Mitchell, Supreme Court
File

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 14:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.H. Const. Part I, art. 15:

No subject shall . . . be compelled to accuse or furnish evidence against himself.

RSA 458:16-a (1992), New Hampshire Statute for Property Division:

I. Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes, but is not limited to, employment benefits, vested and non-vested pension or other retirement benefits, or savings plans. To the extent permitted by federal law, property shall include military retirement and veterans' disability benefits.

II. When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

(a) The duration of the marriage.

(b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party.

(c) The opportunity of each party for future acquisition of capital assets and income.

(d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of any minor children in the custody of said party.

(e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.

(f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties.

(g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home.

(h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party and any interruption of either party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children.

(i) The expectation of pension or retirement rights acquired prior to or during the marriage.

(j) The tax consequences for each party.

(k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.

(l) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:

(1) Caused substantial physical or mental pain and suffering; or

(2) Resulted in substantial economic loss to the marital estate or the injured party.

(m) The value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the marriage.

(n) The value of any property acquired by gift, devise, or descent.

(o) Any other factor that the court deems relevant.

III. The court shall specify written reasons for the division of property which it orders.

N.H.R. Evid. 100:

Pursuant to Part II, Article 73-A of the New Hampshire Constitution the Supreme Court unanimously adopts these rules of evidence. These rules shall govern all cases the trial of which commences on or after July 1, 1985, and shall be effective to the extent they are not inconsistent with statutory law in effect on that date, provided, that upon any later legislative repeal of such inconsistent statutes the appropriate rules shall then become effective. To the extent these rules alter or conflict with the common law, the rules shall govern.

N.H.R. Evid. 401:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.H.R. Evid. 512:

The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by a judge or counsel. No inference may be drawn therefrom.

Rule 16(3)(b) of the Supreme Court of the State of New Hampshire Procedural Rules:

(3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated: . . .

(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his appeal document, but only if the supreme court has granted a motion to add such question, and he has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an

objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

Rule 1101(d)(3) of Applicability of Rules of the New Hampshire Rules of Evidence

(d) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: . . .

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B 24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; proceedings with respect to parole revocation or probation violations; recommittal hearings; divorce cases; and domestic violence proceedings.

New Hampshire Supreme Court Rule 7, Appeal from Lower Court Decision on the Merits:

(1) The supreme court may, in its discretion, decline to accept an appeal, or any question raised therein, from a lower court after a decision on the merits, or may summarily dispose of such an appeal, or any question raised therein, as provided in rule 25. Unless otherwise provided

by law, such an appeal shall be by notice of appeal in the form of notice of appeal approved by the supreme court and appearing in the appendix to these rules, filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits.

New Hampshire Supreme Court Rule 25, Summary Disposition:

(1) The supreme court may at any time, on its own motion and without notice or on such notice as it may order, dispose of a case, or any question raised therein, summarily. An order of summary affirmance under this rule may be entered when (a) no substantial question of law is presented and the supreme court does not disagree with the result below, or (b) the case includes the opinion of the lower court, which identifies and discusses the issues presented and with which the supreme court does not disagree, or (c) the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable, or (d) other just cause exists for summary affirmance, in which case the order shall contain a succinct statement of the reason for affirmance. An order of summary dismissal under this rule may be entered when the supreme court has not considered the merits, because the court clearly lacks jurisdiction, or other just cause for summary dismissal exists, in which case the order shall contain a succinct statement of the reason for dismissal. An order of summary reversal may be made by the supreme court under this rule for just cause and the order shall contain a succinct statement of the reason therefor.

(2) A party may move for summary disposition of a docketed case by filing an original and 7 copies of a motion for summary reversal or affirmance within 20 days of the filing of the appeal. He shall serve a copy of the motion on the opposing party. No motion for summary disposition of a docketed case shall be accepted after 20 days from the filing of the appeal, except if such motion is for the purpose of bringing to the court's attention the effect that an opinion issued since the filing of the docketed case may have on the docketed case. The opposing party has 10 days from the date of filing of any motion for summary disposition within which to file an original and 7 copies of a response to the motion. The supreme court may at anytime, on such motion or response or both, or on its own motion, without notice or on such notice as the court may order, dispose of the case summarily.

(3) The motion for summary disposition and the response to it may each be accompanied by an original and 7 copies of a memorandum of law or brief.

(4) The filing of a motion for summary disposition and of a response shall not toll the time limitations established by law, rule, or order.

(5) Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2002 TERM
FEBRUARY SESSION

No. 2000-147

Annette B. DeMauro

v.

Joseph M. DeMauro

Motion to Supplement the Appellate Record to Address a Question Raised During the February 6th Oral Argument

Now comes Joseph M. DeMauro ("Mr. DeMauro"), Defendant in the above entitled matter, and by and through his attorneys, Sanders & McDermott, P.L.L.C., moves to supplement the appellate record and states as follows:

1. During the course of the February 6, 2002 oral argument, Justice Dalianis asked if the record would reflect whether Mr. DeMauro was presently in contempt for an alleged failure to execute and deliver so-called *Doe* waivers. *See DeMauro v. DeMauro,* 142 N.H. 879, 888 (1988), *citing Doe v. United States,* 487 U.S. 201, 215-16 (1988). The undersigned counsel for Mr. DeMauro answered affirmatively.

2. In fact, the documents addressing the question raised by the Court are not contained in the pleadings and orders on file at the *Supreme* Court that now represent the *appellate* record. They consist of a *Superior* Court pleading and two (2) Orders:

A. Plaintiff's Motion to Compel Defendant to Execute Consent Waivers – July 30, 1998 [Exhibit A];

B. Order dated October 23, 1998 [Exhibit B]; and

C. Order dated November 25, 1998 [Exhibit C].

3. A review of the foregoing pleading and Orders discloses that there has been no finding of contempt or a request therefor in connection with the alleged failure to execute and deliver *Doe* waivers.

4. In addition, *Doe* waivers (ordered produced in *another* proceeding) were later executed and delivered by Mr. DeMauro on or about December 8, 2000, as witnessed by Attorney Boumil's December 20, 2000 letter to the office of the undersigned counsel and its enclosure (the executed *Doe* waiver). *See* Exhibit D.

5. Thus, in order to resolve the question raised by Justice Dalianis during the course of oral argument, the appellate record should be supplemented to include Exhibits A through D, attached.

6. Counsel for the Plaintiffs objects to the relief requested.

Wherefore, Mr. DeMauro respectfully requests that this Honorable Court:

A. Supplement the appellate record to include Exhibits A through D, attached; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

Joseph M. DeMauro

By his attorneys,
Sanders & McDermott,
P.L.L.C.

Date: February 12, 2002

By: /s/ Lawrence M. Edelman
Lawrence M. Edelman
N.H. Bar No. 738
234 Lafayette Road
P.O. Box 5070
Hampton, NH 03843-5070
(603) 926-8926

Certificate of Service

I hereby certify that a copy of the foregoing Motion to Supplement the Appellate Record was mailed this 12th day of February, 2002 to Bernard A. Dwork, Esquire, Kathleen M. Morrissey, Esquire, Stephen L. Tober, Esquire, S. James Boumil, Esquire, John P. McGee, Esquire, W. Wright Danenbarger, Esquire and Donald Kennedy, Esquire, counsel of record. In addition, two copies have been mailed to Raymond W. Taylor, Clerk of the Rockingham County Superior Court.

By: /s/ Lawrence M. Edelman
Lawrence M. Edelman

FOUND AS EXHIBIT TO MOTION TO SUPPLEMENT THE APPELLATE RECORD TO ADDRESS A QUESTION RAISED DURING THE FEBRUARY 6TH ORAL ARGUMENT. THIS EXHIBIT WAS NOT LETTERED IN THE ORIGINAL.

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT
JULY TERM, 2000
NO. 94-M-173

ANNETTE B. DEMAURO

v.

JOSEPH M. DEMAURO

Defendant's Proposed Order on "Emergency Motion to Authorize Sale of Immediately Threatened Asset"

(Filed Jul. 11, 2000)

The parties shall obtain an up-to-date appraisal of the Florida Property which shall be sold at no less than that appraised value; the Court shall appoint a master to oversee the voluntary sale of the property;

The Florida Property shall be listed for marketing with a disinterested, local broker experienced in the sale of homes in the Manalapan area. The master shall engage the listing broker and shall be authorized to enter into an agreement with the broker regarding payment of sales commission.

The master shall be paid his or her usual hourly rate and all such reasonable expenses from the gross proceeds of the sale. The master shall be authorized to pay all outstanding insurance and tax payments on the Florida Property. The master shall hold in escrow such amounts sufficient to pay all amounts due or which will be due on the property for 2001 until such time as the Supreme Court issues a ruling on Joseph's appeal or there is otherwise a final judgment in this action.

The master shall be authorized to pay all outstanding fees and expenses incurred by the court appointed receiver, John P. McGee, Esquire, from the gross proceeds.

Plaintiff shall be paid, from the gross proceeds, all monies claimed by the plaintiff under the temporary order of support which she claims are owed to her from July 1998 to February 4, 2000, the date the trial court issued the divorce decree in the underlying action. A determination as to whether payment of those sums to plaintiff is considered spousal support or a partial distribution of marital property shall be deferred until a final judgment is issued in this action and the time to appeal has expired. All issues regarding Joseph's current obligation to pay spousal support and Annette's current need for spousal support shall be deferred until the Supreme Court issues a ruling on Joseph's appeal or such time as a final judgment is issued and the time to appeal has expired.

All net proceeds in excess of the amounts necessary to make the above-referenced payments shall be held in escrow until the time to appeal any final judgment issued in this action has elapsed and thereafter such sums shall be distributed in accordance with such final order.

Such further terms and provisions that will ensure that the equitable division of the marital estate will be deferred until after entry of a final judgment in this action and the time period in which either party may appeal has expired.

Date: July 31, 2000

/s/ Walter L. Murphy
Presiding Judge

EXHIBIT A

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Annette B. DeMauro

v.

Joseph M. DeMauro

94-M-173

PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO EXECUTE CONSENT WAIVERS

NOW COMES Plaintiff, Annette B. DeMauro, in the above-referenced matter, and moves to compel Defendant to execute consent waivers. In support of her motion, Plaintiff states as follows:

1. In its decision, the New Hampshire Supreme Court stated that the Plaintiff may take reasonable steps to discover through alternate means the size and scope of the marital estate. *DeMauro v. DeMauro*, No. 97-136 (N.H. Sup. Ct. Slip Op at 5, June 16, 1998).

2. The New Hampshire Supreme Court held that the trial court may order the defendant to execute consent waivers consistent with those permitted in federal cases for discovery assets Id. At 5. The Supreme Court specifically referenced the waiver in *Doe v. United States* 487 US 201 (1988) as being an appropriate waiver form. The full Text of the opinion is set forth for the convenience of the Court as Exhibit A.

3. Attached hereto as Exhibit B are consent waivers consistent with those permitted in federal cases for the discovery of assets and as set forth in *Doe v. United States* (footnote #2 at 203-204).

4. Since Defendant refuses to provide any financial information whatsoever, (despite having taken for himself all of Plaintiff's money) Defendant's execution of the consent waivers is essential for Plaintiff to discover the size and scope of the marital estate.

5. Equitable distribution of the marital estate especially its alleged tens of millions of liquid assets cannot proceed fairly to Plaintiff unless the size and scope of the marital estate are known to the Plaintiff and to the Court.

6. Concurrence has not been sought due to the nature of this motion and the past history in this case which beyond doubt show such an effort would be futile. WHEREFORE, Plaintiff respectfully requests that this Honorable Court;

A. Grant Plaintiff's Motion to Compel Defendant to Execute Consent Waivers;

B. Order Defendant to execute the attached consent waivers within ten days of the Court Order;

C. Order Defendant's attorneys, as officer of this Court, to obtain Defendant's signature within ten days of the Court Order; and failing which the Court issue an appropriate order affixing Defendants name to the consent waiver or appointing a commissioner/receiver to do so.

E. For such other and further relief as may be just and appropriate.

Respectfully submitted,

ANNETTE B. DEMAURO
by and through her attorneys,
TOBER OFFICES, P.A. &
S. James Boumil, Esq.

Dated: July 30, 1998

BY: /s/ S. James Boumil
S. James Boumil, Esq.
100 Summit St.
Lowell, MA 01852
(978)-453-6785

CERTIFICATION

I HEREBY CERTIFY THAT A COPY OF THE WITHIN Plaintiff's Motion to Compel Defendant to Execute Consent Waivers has been mailed this date, postage prepaid, to Edwinna Vanderzanden, Esquire, and Bernard Dwork, Esquire, opposing counsel.

/s/ S. James Boumil 7/30/98
S. James Boumil, Esq.

CONSENT AND WAIVER FORM

TO: WHOM IT MAY CONCERN

I. Joseph M. DeMauro of the State of Florida in the United States of America, do hereby direct any bank or trust company or fiduciary at which I may have a bank account of any kind or at which a corporation, foundation, trust or business association has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to S. James Boumil, Esq. 100 Summit St. Lowell, MA 01852 (tel:978-458-0507); and to give evidence relevant thereto, in the divorce action of DeMauro v. DeMauro, Rockingham County Superior Court, Docket No. 94-M-173; and this shall be irrevocable authority for doing so. This direction has been executed pursuant to that certain order of the Rockingham, County Superior Court, issued in connection with the decision of the New Hampshire Supreme Court in DeMauro v. DeMauro, #97-136 (N.H. Sup Ct. Slip Op. At 5, decided June 16, 1998). This direction is intended to apply to any and all confidential relationship laws, and to any implied contracts of confidentiality that may be imposed by common law, including, but not limited to elements of fiduciary relationship, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal. This consent and waiver form is intended to release (to the extent that the signatory has the power to do so) the addressee for disclosures made hereunder, from any liability to the signatory under any

banking secrecy" or other applicable laws of Liechtenstein, Switzerland, the United States, Belgium, Luxembourg, France the United Kingdom, Netherlands Antilles, Cayman Islands, or any other country or jurisdiction.

_____
Joseph M. DeMauro of the State of Florida, USA
Date of Birth:

State of _____.
County of _____.

Then personally appeared Joseph M. DeMauro, a person who identified himself to me, and acknowledged that his signature hereto is his free act and deed before me,

_____.
Notary Public/Justice of the Peace
my comm. exp.:

EXHIBIT B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

ANNETTE DEMAURO

v.

JOSEPH DEMAURO

94-M-173

ORDER

A hearing was held before the undersigned on October 19, 1998 on plaintiff's Motion to Compel (Doc.#271), her

Motion for Contempt (Doc.#273) and defendant's Motion for Reconsideration (Doc.#284), the latter being addressed in a separate order of even date. Plaintiff was present and was represented by Stephen L. Tober, Esquire and by S. James Boumil, Esquire, **pro hac vice**. The defendant did not appear and was represented by Edwinna Vanderzanden, Esquire. Also appearing, but not participating in the hearing was John P. McGee, Jr., Esquire, court-appointed temporary receiver.

The court finds and rules, on the basis of the pleadings and the offers of proof made by counsel for the plaintiff (defendant failed to appear and any offer of proof made on his behalf was rejected by the court in accordance with the Rules of the Superior Court), in light of defendant's invoking his right against self-incrimination, the Court will continue to have no information to assess the defendant's financial status in order to affect an appropriate division of the marital assets unless the plaintiff's motion is granted. *See, DeMauro v. DeMauro*, N.H. (decided June 18, 1998).

Accordingly, the court orders the defendant to execute and deliver to plaintiff's counsel, within thirty (30) days of the date of this order, the waiver in the form attached to the plaintiff's motion.

With respect to plaintiff's Motion for Contempt, it is the defendant's contention that the plaintiff has failed to present credible evidence of the defendant's current ability to make court-ordered support payments. For the same reasons cited by Judge McHugh in his most recent order requiring replenishment of the escrow account, the court could make that determination on the basis of the uncontroverted offers of proof made by the plaintiff and in light

of the fact that defendant continues his pattern of wilfully failing to appear for court hearings.

All that notwithstanding, the plaintiff's Motion for Contempt will be the subject of a hearing to be scheduled by the clerk's office as soon as the court calendar permits at which the defendant shall be ordered to show cause as to why he should not be held in contempt for his failure to make timely court-ordered support payments to the plaintiff.

In the interim, at the plaintiff's request, a **CAPIAS** shall be issued for the arrest of the defendant for his failure to comply with Judge McHugh's order of June 25, 1998 (Doc.#264), returnable no later than July 1, 1999, unless extended per court order, bail, if appropriate, to be set upon apprehension.

So ordered.

October 23, 1998

/s/ Walter L. Murphy
WALTER L. MURPHY
Presiding Justice

EXHIBIT C

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

ANNETTE DEMAURO

v.

JOSEPH DEMAURO

94-M-173

ORDER

Pursuant to this court's order of October 23, 1998 (Doc.#288), a hearing was scheduled for this date for the defendant to show cause why he should not be held in contempt for failure to comply with previous temporary orders requiring him to make monthly payments of $20,000 each to the plaintiff. Defendant failed to appear or establish that he is currently financially unable to comply with that order. Defendant's counsel offered to present no evidence except through examination of the plaintiff who she conceded could not offer any credible testimony as to defendant's current financial ability to make payments, which testimony the court accordingly barred. Defendant is accordingly found in civil contempt therefor; arrearage is currently found to be in the amount of $80,000, no payments having been made since June, 1998.

CAPIAS to issue returnable not later than June 15, 1999; bail, if appropriate, to be set upon apprehension.

Neither has the defendant complied with that portion of the court's order of October 23, 1998 requiring defendant to execute and deliver to plaintiff's counsel the

waivers attached to the plaintiff's motion (Doc. #271); accordingly, the court-appointed Receiver is authorized by this order to execute the same and deliver them to plaintiff's counsel pursuant to paragraph C of that motion.

These orders are held in abeyance for a period of 20 days to give counsel for the defendant the opportunity to file an appeal with the Supreme Court.

So ordered.

November 25, 1998

/s/ Walter L. Murphy
WALTER L. MURPHY
Presiding Justice

EXHIBIT D

S. James Boumil, J. D.
Counsellor at Law

100 Summit Street
Lowell, Massachusetts 01852
U. S. A.
Tel.: (978) 458-0507
Fax: (978) 453-6785

December 20, 2000

Managing Partner
Sanders & McDermott
234 Lafayette Road
Hampton, NH 03843

Dear Sir:

Attached per the Order of Middlesex County Superior Court, please find a release executed by Joseph M. DeMauro. We desire to know the nature and extent of any financial deposits he has had with your company including, but not limited to retainer fees and/or payment of legal fees.

As you know, legal bills are not privileged. We do not seek the bill in any event, but merely a notation of the financial transactions with your company and a detail of

the amount of monies which have been on deposit currently and from time to time.

Sincerely yours,

/s/ S. James Boumil
S. James Boumil, Esq.

SJB:lp

I, Joseph M. DeMauro of the State of Florida in the United States of America, hereby direct any bank or trust company or fiduciary at which I may have a bank account of any kind or at which a corporation, foundation, trust or business association has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank accounts to: Christine M. Roach, Esq. Special Master, 24 School St. Boston, MA 02108 U.S.A. This directive shall be irrevocable authority for providing said information. This direction has been executed pursuant to ORDER of the Middlesex Superior Court in the Commonwealth of Massachusetts, USA in the case of Annette B. DeMauro v. Joseph M. DeMauro et al # 97-2995. This direction is intended to apply to any and all confidential relationship laws, and to any implied contracts of confidentiality that may be imposed by common law, including but not limited to elements of fiduciary relationship and shall be construed as consistent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal. This consent waiver form is intended to release the addressee for disclosures made hereunder, from any liability to the signatory under any

"banking secrecy" or other applicable law(s) of Liechtenstein, Switzerland, the United States, Belgium, Luxembourg, France, the United Kingdo[m], Netherlands Antilles, Cayman Islands, or any other country or jurisdiction.

/s/ Joseph M. DeMauro
Joseph M. DeMauro DATE: 12-8-00

STATE OF FLORIDA

Palm Beach Cy, ss. December ___ 2000

Then personally appeared the above signed Joseph DeMauro and acknowledged that the above is his signature hereon, pursuant to ORDER of Court.

/s/ Robbye Soler
Notary Public

My Comm. exp. [LOGO]

Robbye Soler
MY COMMISSION
CC656234 EXPIRES
June 17, 2001
BONDED THRU TROY FAIN
INSURANCE, INC.

QUESTIONS RAISED BY JOSEPH M. DEMAURO IN DEFENDANT'S NOTICE OF APPEAL, DATED MARCH 10, 2000.

(APPEARING AT PAGE 14 OF THE DOCUMENT ENTITLED "DEFENDANT'S NOTICE OF APPEAL FROM SUPERIOR COURT DECISION ON THE MERITS")

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2000 TERM

MARCH SESSION

Annette B. DeMauro

v.

Joseph M. DeMauro

Defendant's Notice of Appeal
from Superior Court Decision
on the Merits

Lawrence M. Edelman
Sanders & McDermott, P.L.L.C.
234 Lafayette Road
P.O. Box 5070
Hampton, NH 03843-5070
(603) 926-8926

* * *

SPECIFIC QUESTIONS TO BE RAISED UPON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH

QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

1. Whether the Superior Court erred in punishing Mr. DeMauro for exercising privileged silence by issuing a decree of property division and alimony drawn on an *extrapolation* of remote and speculative information which, in any context, would not qualify as admissible evidence.

2. Whether the Superior Court's misinterpretation of this Court's Decision in *DeMauro v. DeMauro*, 142 N.H. 879 (1998) so tainted the Court's treatment of the issues that Mr. DeMauro was deprived of his right to due process and his right to suffer no penalty for his privileged silence.

3. Whether the Superior Court erred when it illegally readjusted the parties' rights and obligations existing under the United States Internal Revenue Code, contrary to 26 U.S.C. §215 (Internal Revenue Code – Alimony).

4. Whether the Superior Court erred by purporting to illegally attach Mr. DeMauro's Social Security Retirement Benefits and assign them to Ms. DeMauro, contrary to 42 U.S.C. §407(a) [Social Security; Assignment].

5. Whether the Superior Court erred by purporting to adjust the rights and obligations of business entities not party to the divorce action and by departing from its own evidentiary ruling that it would not address any issue being litigated in the Massachusetts action, including Mr. DeMauro's alleged interest in DeMauro Co., all contrary to the fundamental right of due process.

* * *

STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss. SUPERIOR COURT TERM NOVEMBER 1999

ANNETTE DEMAURO, Plaintiff, vs. JOSEPH DEMAURO, Defendant.	*	Docket No. 94-M-173

TRANSCRIPT OF HEARING ON THE MERITS

DAY ONE

BEFORE

Honorable Walter L. Murphy
Presiding Justice
Rockingham County Superior Court
Brentwood, New Hampshire

NOVEMBER 15, 1999

APPEARANCES:

For the Plaintiff:

Stephen L. Tober, Esq.
Portsmouth, New Hampshire

James S. Boumil
Lowell, Massachusetts

For the Defendant:

Edwinna L. Vanderzanden, Esq.
Lawrence M. Edelman, Esq.
Hampton, New Hampshire

Bernard A. Dwork, Esq.
Boston, Massachusetts

Court Recorder:

Renee O'Barton

* * *

[11] THE COURT: You can certainly reassert any objection that you wish to any of the evidence as it comes in. However, with respect to that matter the Court made the determination that on that particular instance the Rules of Evidence didn't apply based upon the fact that this is the only information that we have. I take it that Mr. DeMauro has still not graced us with his presence here today?

MR. EDELMAN: That's correct.

THE COURT: And I take it that I can be assured by you that he's not going to come, is that correct?

MR. EDELMAN: I understand he will not be here.

THE COURT; All right. So the only information we have is the old information, and otherwise it's all speculation, and I'm going to permit the admission of that evidence relative to Mr. Ouelette's opinion based upon an extrapolation of the old information. And that's all I've said.

MR. TOBER: Your Honor, I'd appreciate some clarification, then. If the Court is essentially saying the Rules of Evidence apply, then Rule 1101 does apply, and Rule 1101 –

THE COURT: Now, wait a second. Hold it. Hold it. What I'm saying, simply, is this: The Court is going to exercise its discretion in the matters as to – [12] evidentiary matters, having in mind that the strict Rules of Evidence do not apply in these matters. However, there are some items that are so outrageous, or so based upon hearsay, or so based upon matters that are just not reliable that the Court will exercise its discretion and not permit that evidence.

MR. EDELMAN: Your Honor, again just for clarification if – if –

THE COURT: This is not for clarification. This is for your own –

MR. EDELMAN: No, it is for clarification. I just want to understand the –

THE COURT: Make your objection and I'll rule on it at each –

MR. EDELMAN: But the Court has indicated that it would admit the Ouelette report, and if we find that the Ouelette report is based upon evidence that is indeed remote under the common-law Rules of Evidence or the New Hampshire Statutory Rules of Evidence –

THE COURT: I will give it the weight I think it deserves.

MR. EDELMAN: Thank you.

THE COURT: Now, the defendant has defaulted by his failing to be here and failing to comply with the order of the Court. I have fashioned that order in such a way as

* * *

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
SEPTEMBER TERM, 1999
NO. 94-M-173

Annette B. DeMauro

v.

Joseph M. DeMauro

MOTION IN LIMINE TO EXCLUDE REMOTE AND SPECULATIVE EVIDENCE OF DEFENDANT'S FINANCIAL CONDITION

NOW COMES Joseph M. DeMauro, Defendant in the above entitled matter, and by and through his attorneys, Sanders & McDermott, P.L.L.C., moves to exclude evidence of Mr. DeMauro's financial condition which is remote in time and otherwise speculative, and states as follows:

1. The Plaintiff, Annette DeMauro ("Ms. DeMauro") has indicated that she intends to introduce evidence regarding the financial condition of the Defendant, Joseph DeMauro ("Mr. DeMauro") in this divorce action.

2. The evidentiary materials on which Ms. DeMauro intends to rely are so dated that they should be excluded as too remote in time to prove relevant to Mr. DeMauro's financial condition today. They should also be excluded because they lack probative value. That is to say, because of the vintage of the materials, they do not have a tendency to prove the state of Mr. DeMauro's current finances. Additionally, the nature of some of the evidence proposed is speculative and should be excluded.

3. Ms. DeMauro has submitted some specific items of material in her pretrial pleadings which purportedly relate to Mr. DeMauro's financial condition, including a March 1994 report prepared by the accounting firm of Smith, Batchelder & Rugg for presentation to her former attorney, Paul R. Kfoury, Esquire. That report extrapolates a possible current net worth based on assumptions which are purely speculative.

4. In addition, Ms. DeMauro's pleadings are prolific in their references to Mr. DeMauro's allegedly vast wealth. These pleadings are avowedly based on information and assumptions drawn from the 1970's and the 1980's.

5. Even the most elastic view of relevancy would find this outdated information irrelevant to the case at hand. Relevant evidence is that which has a tendency to make the existence of any consequential fact more probable or less probable than it would be without it. N.H.R. Evid. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory committee notes, Fed. R. Evid. 401. For evidence to meet Rule 401, it "must have some tendency to establish a fact of consequence to the determination of the action." *Welch v. Bergeron*, 115 N.H. 179, 182 (1975).[1] That tendency must be to advance the inquiry and to establish the proposition that it is offered to prove. John W. Strong, *et al.*, McCormick on Evidence § 185 (5th ed. 1999).

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[1] In fact, the rule in New Hampshire may still be that relevancy denotes "something more than a minimum of probative value. Each single piece of evidence must have a plus value." Reporter's Notes, N.H.R. Evid. 401 (citing *Hebert v. Boston &, Me. RR*, 90 N.H. 324 (1939).

6. Evidence which is remote, meaning in this case that which is too far removed in time, should be excluded as it is not relevant. "Evidence can be either remote in time or remote in the sense of being too attenuated, *i.e.*, not relevant." *Donahue v. Albertson's Inc.*, 472 So. 2d 482, 482 (Fla. 4th Dist. Ct. App. 1985). "Remoteness relates not to the passage of time alone, but to the undermining of reasonable inferences due to the likelihood of supervening factors." John W. Strong *et al.*, McCormick on Evidence § 185 at 640 (5th ed. 1999). Evidence will be found to be too remote "when there is no visible, plain or necessary connection between it and the proposition eventually to be proved." *NLRB v. Ed Chandler Ford, Inc.*, 718 F.2d 892, 893 (9th Cir. 1983) (citing *Black's Law Dictionary* definition for "remoteness of evidence"[2] 1164 (5th ed.)).[3] "It is the function and the duty of the court of its own motion to exclude evidence that it deems too remote, even though possibly it may have some nebulous logical distant relevancy to the issue." *United States v. Maryland & Va. Milk Prod. Ass'n*, 20 F.R.D. 441, 442 (D.D.C. 1957). The evidence which Ms. DeMauro proposes to offer to prove the value of the marital estate in this case has less than a "nebulous logical distant relevancy" to the current status of the estate, and should be excluded.

---

[2] "When the fact or facts proposed to be established as a foundation from which indirect evidence may be drawn, by way of inference, have not a visible, plain or necessary connection with the proposition eventually to be proved, such evidence is rejected for remoteness." *Black's Law Dictionary* 1164 (5th ed.).?? [3] The question of

[3] The question of remoteness is within the sound discretion of the trial judge. *State v. Alexander*, ___ N.H. ___, 723 A.2d 22, 26 (1998); *Hunt v. Goodimate Co.*, 94 N.H. 421, 424 (1947).

7. In New Hampshire, the seminal case on the time during which financial information can remain relevant is *Key Bank of Maine v. Latshaw*, 137 N.H. 665 (1993). In that case, Mr. Latshaw was alleged to have submitted a false financial statement to a federally insured bank. That is to say, in pursuit of its collection action, Key Bank alleged facts which would have supported an indictment for bank fraud. Some 14 months had passed between the submission of financial statement and Mr. Latshaw's deposition, during which he elected to remain silent and assert his constitutional rights against self-incrimination. *Latshaw*, 137 N.H. at 671. The Court affirmed Mr. Latshaw's right to remain silent during his deposition, but went on to hold that 3 years and 5 months later, on the date of the reported decision, evidence of Mr. Latshaw's current financial condition *no longer* had a tendency to prove the state of his finances when he presented the allegedly false financial statement. The Court stated the following:

> The Latshaws argue that this time span is irrelevant because Mr. Latshaw's financial condition at one point in time is necessarily related to his condition at any other point. Although this is true in the literal sense, it is also true that as the time increases between any two factual conditions, the connection between them becomes weaker and weaker. Each passing day provides fresh opportunities for a New Hampshire business person to lose money, such that a discovery that Mr. Latshaw is now [*on November 10, 1993*] insolvent would not longer tend to prove that he was also insolvent in June 1990.

Id. The Court determined that the passage of three years and five months, taken alone, was sufficient to attenuate

the relationship between Mr. Latshaw's former worth and his then present financial situation. Thus, as a matter of law, the materials bearing on Mr. DeMauro's financial condition more than three years and five months ago are simply not probative. They are irrelevant and must be excluded.

8. Indeed, even the Supreme Court of the United States has recognized that evidence of financial condition does not have a long half-life. In a tax evasion case, the government was attempting to prove the financial worth of the defendant without a substantiated starting point. *United States v. Calderon*, 348 U.S. 160, 165 (1954). "Proof that the taxpayer was impoverished by the depression, that he was working for his meals and $8 a week in 1935, is too remote, absent proof of the taxpayer's financial circumstances in the intervening years." *Id. See also Fairchild v. United States*, 240 F.2d 944, 947 (5th Cir. 1957).

9. In addition, not only is the report of Smith, Batchelder and Rugg based upon information which is too remote in time to be relevant, it is the product of mere speculation and should be excluded accordingly. "Speculativeness usually arises with regard to dubious projection in to the future or questionable surmises about what might have happened had the facts been different." John W. Strong et al, McCormick on Evidence § 185 at 640 (5th ed. 1999). The information upon which the accountants' hypothetical calculations are based has no foundation in fact as Ms. DeMauro has no support for the information upon which the calculations are based. The rates of return projected by her accountants are just the type of "questionable surmise[ ] about what might have happened had the facts been different" as there is no basis for these rates

of growth. Indeed, Smith, Batchelder and Rugg has no information to suggest that Mr. DeMauro did not invest the allegedly vast sums of money in the 8-track tape and carbon paper industries.

10. For all of the foregoing reasons, the Court should properly exclude proposed financial evidence that is remote in time (*i.e.* beyond 3 years and 5 months old) and speculative.

WHEREFORE, Mr. DeMauro respectfully requests that this Honorable Court:

A. Exclude proposed financial evidence that is remote in time (*i.e.* beyond 3 years and 5 months old) and speculative; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

Joseph M. DeMauro

By his attorneys,
Sanders & McDermott, P.L.L.C.

Date: October 29, 1999

By: _____
Lawrence M. Edelman
N.H. Bar No. 738
234 Lafayette Road
P.O. Box 5070
Hampton, NH 03843-5070
(603) 926-8926

Certificate of Service

I hereby certify that a copy of the foregoing Motion in Limine was mailed this 29th day of October, 1999 to Stephen L. Tuber, Esquire and S. James Boumil, Esquire, counsel of record.

Lawrence M. Edelman

PLAINTIFF'S EXHIBIT 84 94-M-173 11/17/99
OUELLET EXHIBIT NO. 1-b 11/10/99

HISTORICAL RETURNS
PREPARED FOR ANNETTE DEMAURO
BY RONALD E. OUELLET, CPA – MBA
October 25, 1999

	Beginning of Year		Annual Returns				End of Year Values		
	Deposit	Withdrawal	Lehman Bros Interm Gov't	S&P 500 Composite	Lehman Bros Corp Bonds	Intermediate Gov't Bonds	S&P 500 Composite	Long Term Corp Bonds	50% Long Term Corp Bonds 50% S&P 500 Composite
1976		(150,000)	0.00%	0.00%	0.00%	(150,000)	(150,000)	(150,000)	(150,000)
1977	2,500,000	(150,000)	3.00%	-7.42%	3.16%	2,266,000	2,036,760	2,269,520	2,153,140
1978	2,000,000	(200,000)	2.26%	6.39%	0.36%	4,157,892	4,081,929	4,084,170	4,083,050
1979	3,000,000	(1,550,000)	6.59%	18.20%	-2.11%	5,977,452	6,538,740	5,417,399	5,978,070
1980	3,000,000	(650,000)	6.65%	32.27%	-0.29%	8,881,227	11,757,136	7,744,874	9,751,005
1981	300,000	(250,000)	10.79%	-5.01%	2.95%	9,894,907	11,215,599	8,024,823	9,620,211
1982	3,000,000	(850,000)	25.42%	21.44%	39.20%	15,106,722	16,231,183	14,163,353	15,197,268
1983	2,500,000	(1,400,000)	8.22%	22.39%	9.27%	17,538,914	21,211,635	16,678,266	18,944,951
1984		(850,000)	14.29%	6.10%	16.62%	19,073,760	21,603,695	18,458,924	20,031,309
1985		(640,000)	18.00%	31.63%	24.05%	21,751,837	27,594,512	22,104,375	24,849,443
1986		(1,150,000)	13.06%	18.56%	16.54%	23,292,437	31,352,613	24,420,228	27,886,421
1987		(650,000)	3.61%	5.10%	2.56%	23,459,829	32,268,446	24,378,746	28,323,596
1988	1,000,000	(2,925,000)	6.40%	16.23%	9.22%	22,913,058	35,268,188	24,523,982	29,896,085
1989		(2,300,000)	12.68%	31.37%	14.09%	23,226,794	43,310,308	25,355,341	34,332,824
1990		(1,771,000)	9.56%	-3.27%	7.05%	23,506,968	40,180,973	25,247,037	32,714,005
1991	15,000,000	(1,050,000)	14.11%	30.47%	18.51%	42,742,146	70,624,680	46,452,408	58,538,544
1992		(800,000)	6.93%	7.61%	8.69%	44,848,737	75,138,338	49,619,602	62,378,970
1993		(800,000)	8.14%	10.02%	12.16%	47,634,304	81,787,040	54,756,066	68,271,553
1994		(220,000)	-1.75%	1.32%	-3.93%	46,584,553	82,643,725	52,392,799	67,518,262
1995		(220,000)	14.41%	37.57%	22.25%	53,045,686	113,390,318	63,781,246	88,585,782
1996		(220,000)	4.06%	22.96%	3.28%	54,970,408	139,154,223	65,646,055	102,400,139
1997		(220,000)	7.72%	33.37%	10.23%	58,977,140	185,296,574	72,119,141	128,707,857
1998		(220,000)	8.49%	28.34%	8.51%	63,745,621	237,527,275	78,017,758	157,772,516
Jun 1999			-0.46%	11.69%	-2.21%	63,452,391	265,294,213	76,293,565	170,793,889

Source of Returns: CDA Weisenberger

PLAINTIFF'S EXHIBIT 85 94-M-173 11/17/99
OUELLET EXHIBIT NO. 1-c 11/10/99

HISTORICAL RETURNS
PREPARED FOR ANNETTE DEMAURO
BY RONALD E. OUELLET, CPA – MBA
October 27, 1999

	Beginning of Year		Annual Returns				End of Year Values			
	Deposit	Withdrawal	Lehman Bros Interm Gov't	S&P 500 Composite	Lehman Bros Corp Bonds	Intermediate Gov't Bonds	S&P 500 Composite	Long Term 500 Corp Bonds	50% Long Term Corp Bonds 50% S&P 500 Composite	CPI
1976		(150,000)	0.00%	0.00%	0.00%	(150,000)	(150,000)	(150,000)	(150,000)	4.81%
1977	2,500,000	(150,000)	3.00%	-7.42%	3.16%	2,266,000	2,036,760	2,269,520	2,153,140	6.77%
1978	2,000,000	(200,000)	2.26%	6.39%	0.36%	4,157,892	4,081,929	4,084,170	4,083,050	9.03%
1979	3,000,000	(1,550,000)	6.59%	18.20%	-2.11%	5,977,452	6,538,740	5,417,399	5,978,070	13.31%
1980	3,000,000	(650,000)	6.65%	32.27%	-0.20%	8,881,227	11,757,136	7,744,874	9,751,005	12.40%
1981	300,000	(250,000)	10.79%	-5.01%	2.95%	9,894,907	11,215,599	8,024,823	9,620,211	8.94%
1982	3,000,000	(850,000)	25.42%	21.44%	39.20%	15,106,722	16,231,183	14,163,353	15,197,268	3.87%
1983	2,500,000	(1,400,000)	8.22%	22.39%	9.27%	17,538,914	21,211,635	16,678,266	18,944,951	3.60%
1984		(850,000)	14.29%	6.10%	16.62%	19,073,760	21,603,695	18,458,924	20,031,309	3.95%
1985		(640,000)	18.00%	31.63%	24.05%	21,751,837	27,594,512	22,104,375	24,849,443	3.77%
1986		(1,150,000)	13.06%	18.56%	16.54%	23,292,437	31,352,613	24,420,228	27,886,421	1.13%
1987		(650,000)	3.61%	5.10%	2.58%	23,459,829	32,268,446	24,378,746	28,323,596	4.41%
1988	1,000,000	(2,925,000)	6.40%	16.23%	9.22%	22,913,058	35,268,188	24,523,982	29,896,085	4.39%
1989		(2,300,000)	12.68%	31.37%	14.09%	23,226,794	43,310,308	25,355,341	34,332,824	4.65%
1990		(1,771,000)	9.56%	-3.27%	7.05%	23,506,958	40,180,973	25,247,037	32,714,005	6.11%
1991	15,000,000	(1,050,000)	14.11%	30.47%	18.51%	42,742,146	70,624,680	46,452,408	58,538,544	3.06%
1992		(800,000)	6.93%	7.61%	8.69%	44,848,737	75,138,338	49,619,602	62,378,970	2.87%
1993		(822,960)	8.14%	10.02%	12.16%	47,609,475	81,761,779	54,730,314	68,246,047	2.78%
1994		(845,838)	-1.75%	1.32%	-3.93%	45,945,273	81,984,032	61,766,816	68,875,424	2.68%
1995		(868,607)	14.41%	37.57%	22.25%	51,572,328	111,590,627	62,223,183	86,906,905	2.47%
1996		(889,959)	4.06%	22.96%	3.28%	52,740,073	136,117,542	63,344,854	99,731,248	3.39%
1997		(920,128)	7.72%	33.37%	10.23%	55,820,445	180,312,790	68,810,685	124,561,838	1.70%
1998		(935,771)	8.49%	28.34%	8.51%	59,544,383	230,212,467	73,651,287	151,931,877	1.61%
Jun 1999		(475,418)	-0.46%	11.69%	-2.21%	56,797,247	258,593,310	71,558,682	164,075,096	2.14%

Source of Returns: CDA Weisenberger

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS **SUPERIOR COURT**

Annette B. DeMauro

v.

Joseph M. DeMauro

94-M-173

DIVORCE DECREE

The undersigned conducted a three day hearing on the merits of a Libel for Divorce at which the defendant failed to appear, as a consequence thereof he was defaulted in accordance with the court's notice contained in its Final Domestic Pretrial Conference order of November 8, 1999 (Doc.#375) which contained the following language:

> "Defendant is ORDERED to appear in person for hearing on the merits as currently scheduled. Because his counsel have declined to assure the court that he will appear, it is unlikely that he will do so. His failure to appear will result in default, as a result of which all factual assertions contained in the plaintiff's pleadings shall be taken **pro confesso**. Trial will then proceed to the issue of alimony and property division. *See, Douglas v. Douglas*, 143 N.H. (decided March 13, 1999)."

The plaintiff was represented by Stephen L. Tober and S. James Boumil (**pro hac vice**), Esquires, and the defendant by Edwinna C. Vanderzanden and Lawrence M. Edelman, Esquires, along with Bernard Dwork, Esquire, **pro hac vice**.

No less than 385 separate pleadings have been filed since the inception of this case in 1994, some of which continue to be filed post-hearing.

While there is some dispute between the parties relative to the date upon which they were legally married (the parties apparently engaged in a marriage ceremony prior to the defendant's having been legally divorced from his first marriage), by virtue of defendant's default and the court's order herein, it is found and ruled it occurred in December, 1979 at a time when they were living in Okinawa, Japan and were virtually penniless as a result of the defendant's failed business and the plaintiff's divorce from her first marriage. Both have children from prior marriages, all of whom have attained majority and are no longer dependent upon them. No children were born of the marriage. The parties separated when the parties were residing in Rye, New Hampshire in November, 1991 and have been living separate and apart since that time.

Subsequent to their marriage, the parties moved to Saudi Arabia where the defendant became involved in the construction business, the defendant being employed in the enterprise as a bookkeeper until 1975 when the parties agreed that she would not work outside the home but would be available to wine and dine potential business clients and various political and government figures, hosting various opulent social activities for the benefit of the business enterprise. The plaintiff is currently sixty-two years of age and a college graduate but has never utilized her degree in her employment.

Once the construction business in Saudi Arabia took hold, the parties lived a lifestyle what can only be described as lavish. The defendant has enjoyed significant

financial success as a result of his earned and, later unearned, income, and has boasted to the plaintiff after this action was commenced, that he has assets over which he has control in excess of $150,000,000. During the course of the parties' divorce litigation, he has persisted in his refusal to answer interrogatories, produce authorizations to plaintiff's counsel for financial information or file a financial affidavit as required by the Rules of Court. He insists, through counsel, that the basis for his failure is that in the light of the fact that allegations of criminal activity have been made against him by the plaintiff's Massachusetts counsel, the furnishing of that information would violate his federal and state constitutional rights against self-incrimination. His position has been rejected both by this court in its prior orders and on his appeal, by the Supreme Court (142 N.H. 879 [1998]) and defendant found to be in contempt on several occasions for failure to produce records or authorizations, as well as for violation of court orders relative to his obligation to provide temporary alimony to the plaintiff. As a result, warrants have been issued by this court for the defendant's arrest.

The court further finds and rules that the defendant has indicated to the plaintiff that unless she accedes to his offers for the payment of alimony and division of marital property, she will never receive anything from him and that he would continue, with the aid of his vast financial resources, to avoid service of process and arrest, a threat which has proven to be all too accurate to date.

The defendant has been engaged in a continuing and calculated effort to conceal the true extent of his business and personal assets by investing monies in off-shore accounts and in various foundations formed in foreign jurisdictions. Among the assets accumulated during the

course of the parties' marriage which are known to the defendant is real estate consisting of the marital home in Rye, N.H., valued at $3,000,000, property consisting of land and a residence located in Manalapan, Florida, valued at $4,000,000, and land and buildings located in Tennessee valued at $150,000.

On the basis of the pleadings and the evidence, the court issues the following decree:

1. **DIVORCE; GROUNDS:** The plaintiff is granted a divorce on the grounds of adultery of the defendant.

2. **ALIMONY:** The defendant is ordered to pay to the plaintiff the sum of $20,000 monthly as alimony for her support for five (5) years from the date of this decree, or until the plaintiff's remarriage, co-habitation or her death, whichever shall first occur, payments to commence forthwith.

3. **HEALTH INSURANCE/COSTS:** The defendant shall be responsible for the payment of health insurance benefits for the plaintiff for a period of five (5) years from the date of this order for so long as the plaintiff shall remain unmarried or eligible for an employer's sponsored group plan, in an amount and coverage consistent with the plan which was in effect at the end of 1998.

Each party shall be solely responsible for his/her uninsured health care and dental expenses except to the extent that they are uncovered expenses as a result of the defendant's failure to comply with the above paragraph, in which event they shall be the sole responsibility of the defendant.

4. **LIFE INSURANCE:** The defendant shall obtain and maintain in full force and effect at his sole expense for

not less than five (5) years from the date of this decree an insurance policy insuring his life and irrevocably designating the plaintiff as his sole beneficiary in a face amount of not less than $500,000 to provide security for the payment of alimony hereunder.

5. **MOTOR VEHICLES:** Each party is awarded whatever motor vehicle (s) are currently in their respective possessions free and clear of any claim the other party may have against the same.

6. **FURNITURE and PERSONAL PROPERTY:** Plaintiff is awarded all household furniture and furnishings and personal property currently located at 2595 Ocean Boulevard, Rye Beach, New Hampshire as well as the items of personal property she received in her first marriage and her clothing in the possession of the defendant in Florida. Plaintiff is also awarded the baby grand piano which now or formerly was located at 1040 South Ocean Boulevard, Manalapan, Florida. These items shall be promptly shipped by a recognized carrier to 2595 Ocean Boulevard, Rye, New Hampshire at defendant's sole expense.

7. **PENSION/SOCIAL SECURITY BENEFITS:** To the extent that there remains at any time any outstanding monetary amount under this Decree from the defendant to the plaintiff, the plaintiff shall have a lien upon and shall be entitled to receive any Social Security benefits due and payable to defendant from the United States of America or from any other source. The plaintiff shall be entitled to a separate Decree or court order as may be reasonably required from time to time by the Social Security Administration for the purposes hereof.

8. **INTANGIBLE PERSONAL PROPERTY:** Plaintiff is awarded all bank accounts and monies in her possession, control or name, free and clear of all right, title, or interest of the defendant.

9. **REAL ESTATE**

A. The real estate located at 2595 Ocean Boulevard, Rye Beach, New Hampshire standing in the name of Klaidonis Foundation was intended by both parties to be a marital residence and to be placed in their joint names in accordance with the provisions of a purchase and sale agreement dated September 3, 1986.

The reasonable value is $3 million dollars; it is ordered that the plaintiff be assigned the defendant's interest in the same and that defendant be entitled to a credit against the total sum awarded to the plaintiff in paragraph 10 hereof in the amount of $1.5 million dollars less one-half of the real estate taxes currently due.

B. The real estate located at 1040 South Ocean Boulevard, Manalapan, Florida was likewise intended by the parties to be a marital residence and the equity therein shared equally. The reasonable value thereof is $4 million dollars; it is ordered that plaintiff be assigned the defendant's interest in the same and that the defendant be entitled to a credit against the total sum awarded the plaintiff in paragraph 10 hereof in the amount of $2 million dollars less one-half of the real estate taxes currently due.

C. The parties' residence located in Sumner County Tennessee, the fair market value of which is $150,000 is awarded to the plaintiff free and clear of any interest of the defendant,

$75,000 to be credited against defendant's indebtedness to the plaintiff under paragraph hereof.

Given the defendant's continued contemptuous refusal to disclose any interests he may have in real estate, to the extent that the additional amount of money awarded hereunder has not been satisfied by the defendant and Petitioner identifies any further real estate that she claims is owned directly or indirectly by the defendant, nothing herein shall be construed as prohibiting the plaintiff from seeking modification of this decree to take into account such real estate or from pursuing other appropriate legal remedies in a court of competent jurisdiction to ensure defendant's compliance with this order.

10. **OTHER ASSETS:** The plaintiff is awarded the sum of $35 million dollars representing what the court has determined to be no more than 50% of the value of the parties' marital assets and represents the fair and equitable division of the parties' marital property to the extent that the marital assets are known in light of defendant's refusal to disclose their extent.

The defendant has an interest in the "Redonia Foundation" a/k/a Redonia Corp., which is currently owed approximately $2.6 million dollars by DeMauro Co., a Delaware corporation doing business in Massachusetts in which the defendant also has an interest. That account receivable is assigned to the plaintiff for which the defendant shall be entitled to a credit against the total sum awarded the plaintiff in paragraph 10 hereof for any monies actually recovered by the plaintiff thereon, less all costs and reasonable attorney's fees associated with the collection thereof.

11. **INDEBTEDNESS:** It is hereby recognized that the defendant has incurred a debt to one Louis D'Auria who has an attachment against the assets of the defendant in the amount of $800,000, which this Court has ordered to have a priority second to the attachment granted to plaintiff on the Rye Beach, New Hampshire. [sic] The defendant is solely responsible for the payment of the debt and is ordered to indemnify and hold harmless the plaintiff from any and against all claims and costs, including attorney's fees arising out of the debt.

12. **TAXES:** To the extent that any income and/or gifts taxes may be owing to the United States of America, any State of the United States, or any foreign jurisdiction, the defendant is hereby ordered to indemnify and hold harmless the plaintiff from any and against the same and to be solely responsible for the payment of any costs and reasonable attorney's fees incurred by the plaintiff in defense of same.

13. **UNPAID SUMS:** Any sums due hereunder which remain unpaid for more than thirty (30) days shall bear interest at the applicable New Hampshire judgment together with reasonable costs of collection, including reasonable attorney fees.

14. **RECEIVER:** The defendant shall be solely responsible for the payment of all fees and expenses of the Temporary Receiver in the total amount of $7,500.00 (Doc.#365) which are found and ruled to be reasonable and were necessitated as a result of the defendant's failure to provide financial information required by the rules and orders of this court. Against this sum the receiver is granted permission to apply the sum of $643.63 plus any accrued interest thereon (funds received from Teppco Oil),

as well as any additional funds received as a result of his efforts, an accounting thereof to be furnished parties' counsel. Additionally, the receiver is hereby relieved of any further obligations relative to this case.

15. **CHARGEABLE AGAINST ESTATE:** The obligation of the defendant under the terms of this order shall constitute a charge against his estate or his beneficial interest in any trust, foundation or other legal entity.

16. **EXECUTION OF DOCUMENTS:** Any documents necessary to implement the terms of this Order shall be executed within thirty (30) days of the date hereof. Upon failure of either party to do so, the Court may appoint a receiver to execute such documentation in that party's name which shall operate in all respects as if the party himself/herself has executed said document(s).

17. **RESTRAINING ORDER:** The defendant is hereby ordered to have no contact, directly or indirectly by telephone or otherwise with the plaintiff and shall not enter the property located at 2595 Ocean Boulevard, Rye Beach, New Hampshire.

18. **OUTSTANDING ARREARS:** It is found that as of this date the defendant is in arrears in court ordered support in the amount of $440,000 through January 31, 2000. In accordance with said court ordered support, the prior contempt of Court finding has been entered and CAPIAS issued, the extension date of which expired February 1, 2000 (Galway, J.). The court finds that the defendant has the financial ability to pay the amount in arrears, but refuses to do so and accordingly remain in contempt of Court. It is ordered that a new CAPIAS issue effective February 1, 2000 *nunc pro tunc* returnable no

later than November 1, 2000. Defendant's objection is noted.

19. **ADDITIONAL FINDINGS AND RULINGS:**

Plaintiff's Requests for Rulings of Law are all GRANTED; her Requests for Findings of Fact numbered 1 through 4, 6, 8, 12, 13 through 40 and 43 are GRANTED and the remainder DENIED. The court finds no occasion to address the issue as to whether the plaintiff is entitled to more than a 50% interest in the marital assets under RSA 458:16-a due to the fact that the court considers the plaintiff's interest therein to be, conservatively, no more than 50% thereof.

Defendant's Requests for Findings of Fact numbered 1 through 5, 8 through 10, 17, 23, 26, 28, 33, 34, 35, and 39 through 41 are GRANTED and the remaining DENIED; his requests for Rulings of Law A., D., E., F., G., H., I., and K. are GRANTED and the remainder DENIED.

Many of the defendant's requests for findings of fact are rejected because he failed to present adequate evidence thereof; others are rejected as they are compound and not all elements of the request are granted. Additionally, while the court indicated it clear at hearing that the facts well pleaded by the plaintiff would be taken **pro confesso**, the court made it clear that it would take judicial notice of prior rulings of the court and not necessarily accept as true the allegations made in the parties' pleadings for which no or inadequate proof was offered.

So Ordered.

February 4, 2000

/s/ Walter L. Murphy
Walter L. Murphy
Presiding Justice

LIST OF FINDINGS OF FACT

I. Granted

A. Plaintiff:

1. The parties were married on December 12, 1975, and resided in the State of New Hampshire in excess of one year prior to the filing of the libel. *See* Libel, Paragraphs, 1 & 2.

2. The parties have accumulated significant assets during the term of the marriage, which are located in New Hampshire, Florida, Tennessee, other states, foreign countries, off shore accounts and foreign banks. *See* Libel, Paragraph 4.

3. These assets consist of real and personal property, various forms and types of investment assets, including cash, and various other assets. *See* Libel, Paragraph 4.

4. The Respondent has been engaged in a systematic effort to conceal assets from Petitioner by the fraudulent use of trusts, foundations, off shore accounts, straws and other means, all to the detriment and prejudice of Petitioner. Despite repeated demands of Petitioner that he

cease and desist such activity, the Respondent has failed, refused and neglected to do so. *See* Libel, Paragraph 7.

6. Respondent has been guilty of adultery with one Brenda Gilman, now or formerly of Rochester, New Hampshire. *See* Libel, Paragraph 5.

8. The fault of Respondent as specified in RSA 458:7 II, which is taken as *pro confesso*, led to the breakdown of the parties' marriage.

12. The parties moved to Saudi Arabia in 1976 with funds borrowed from a Saudi business partner when a construction business in which Respondent was involved in Okinawa, Japan suffered a financial collapse. Neither party had significant assets when the marriage began. *See* Testimony of Anne DeMauro.

13. Both Petitioner and Respondent worked in the construction business in Saudi Arabia at its start. Working and living conditions were at least initially, primitive with the parties living in a Quonset hut with Annette DeMauro having to do laundry in a bathtub. Weather conditions were harsh with temperature often going above 120 degrees, and life was particularly difficult for women who were not allowed to drive or enjoy many other civil rights that are taken for granted in the United States. *See* Exhibit 25, 45 and Testimony of Anne DeMauro.

14. The mutual understanding of the parties when they went to Saudi Arabia was that both the business and physical risks of the location, its opportunities and difficulties, would be "share and share alike." No "pre-nuptial" or "postnuptial" agreement was executed to change this understanding, which is legally embodied in any event

(apart from fault considerations) in the intent of RSA 458:16-a. *See* Testimony of Anne DeMauro.

15. The construction business in Saudi Arabia became very successful, resulting in net distributions for the benefit of the parties, according to a chart provided by Mrs. DeMauro, of not less than $35,150,000 from 1976 through 1991. *See* Exhibit 65.

16. The net distribution figures on the chart are not only specifically supported by Petitioner's unrebutted testimony from her stated examination of the records of the business and the records she and Respondent kept (until lost or stolen at some point) but are inferentially supported by the opulent lifestyle enjoyed by the parties, and various checks and vouchers involving distributions and a handwritten note by Respondent referring to a SR 86,250,000+ distribution for the year 1982. (The rate is 3.4390SR=$1 US). *See* Exhibits 20, 21, 22 and 23.

17. In 1979, the parties purchased a home in Manalapan, Florida, located at 1040 S. Ocean Blvd. ("the Florida home.") The home has frontage both on the ocean and the "inter coastal" waterway. Over $1 million was spent in renovating that home, which currently has a fair market value of $4 million. *See* Exhibits 34, 68 and 69.

18. In 1988, the parties purchased a home at 2595 Ocean Blvd., Rye Beach, New Hampshire ("the Rye Home"). Approximately $2 million was spent on renovating that property, which has a current fair market value of $3,000,000. *See* Exhibits 73, 74, 75, 76, 77 and 78.

19. On December 3, 1987, "Purchase and Sale" agreements for the Rye Home were signed by Joseph M. DeMauro and Annette B. DeMauro to buy the home from

its then owner Donald Jazinski and place it into their names as individuals. *See* Exhibits 73, 74 and 76.

20. Despite the facts found in Paragraphs 14 and 15 above, Joseph M. DeMauro defrauded Annette B. DeMauro of her interest in the Rye Property causing it to be placed into the name of the "Klaidonis Foundation", an entity which according to the deed to the property, is based in Liechtenstein. *See* Exhibits 3 and 75.

21. The Court finds that both the "Klaidonis Foundation" and the "Redonia Foundation" are specific examples of foreign entities used by the Respondent to defraud and otherwise deprive Petitioner of her interests in martial [sic] assets.

22. Redonia Foundation was created by Joseph DeMauro and bears his signature as "principal." It was used by Joseph DeMauro to conceal funds in offshore accounts and wire transfer them into the United States as needed, to such bank accounts as the Central Savings Bank of Massachusetts and the First National Bank of Portsmouth, New Hampshire. *See e.g.*, Exhibits 30, and 39.

23. During the term of their marriage after the construction business became highly successful in the 1970's, the parties enjoyed a lifestyle of the most wealthy individuals enjoying among other items:

A. Travel through their own twin engine airplane with their own private pilot. *See* Exhibit 66;

B. Acquisition of numerous expensive automobiles including two Rolls Royces, Jaguars, Cadillacs and the like. *See* Exhibit 36;

C. Numerous expensive personal possessions such as several hundred thousands of dollars of jewelry for Mrs. DeMauro, several furs including as [sic] sable mink costing over $150,000, and a large collection of "designer" dresses. *See* Testimony of Anne DeMauro;

D. Numerous trips to foreign countries and domestic vacation spots during which the parties enjoyed the best of accommodations. *See* Testimony of Anne DeMauro;

E. Large multimillion dollar oceanfront residences, each staffed by considerable domestic help such as maids and gardeners. *See* Exhibit 3, 11, 34, 77 and Testimony of Anne DeMauro;

H. Hosting of parties and entertainment for numerous friends. *See* Exhibit 35 and Testimony of Anne DeMauro;

I. Membership at country clubs. *See* Testimony of Anne DeMauro;

J. Numerous domestic investments such as oil wells and loans to real estate development companies in the millions of dollars. *See* Exhibit 42.

24. Upon Motion by the Petitioner the Court appointed Jack McGee, Esquire of Portsmouth, New Hampshire in an attempt to assist in identifying, locating, and taking charge of marital assets.

25. The New Hampshire Supreme Court in *DeMauro v. DeMauro*, 142 N.H. 879 (1998) determined that Joseph M. DeMauro, despite his claim of Fifth Amendment privilege, would be required to execute authorizations for

release of back accounts and financial information as required by *Doe v. United States*, 487 U.S. 201, 215-216 (1988). Despite the holding by the New Hampshire Supreme Court and the derivative Order of this Court, Mr. DeMauro refused to provide the authorizations. For this act he has been held in contempt and a capias has been issued.

26. The Court finds that Joseph M. DeMauro's refusal to provide the "Doe" authorizations as ordered by this Court represents deliberate and calculated effort by Joseph M. DeMauro to frustrate and impede the work of the Court-appointed Receiver, which prevented the Receiver from obtaining any meaningful information on the assets and bank accounts being held by Joseph M. DeMauro, either in his own name or in that of the "foundations" or other entities he has used to conceal the parties, [sic] assets. *See* Exhibit 88 and Testimony of Attorney McGee.

27. The Court-appointed Receiver had no resources to use to conduct that type of extensive search for assets which would be required when faced with an individual deliberately concealing assets in the names of "foundations" and offshore trusts based in jurisdictions such as Liechtenstein and the Cayman Islands. Joseph M. DeMauro's failure to pay Court ordered support to Mrs. DeMauro caused the Receiver's lack of resources and furthered Joseph DeMauro's intentional plan to frustrate the Receiver's ability and Annette DeMauro's ability to locate assets and report them to the Court.

28. Joseph M. DeMauro stopped paying Court ordered support in July of 1998, commencing with the very next due date after the decision *DeMauro v. DeMauro*, 142

N.H. 879 (1998). Through November 15, 1999 said support arrearage is $340,000.

29. Joseph M. DeMauro has also neglected and refused to pay Court ordered house maintenance bills. The Court previously held a hearing and awarded Mrs. DeMauro an amount from the security fund towards back home maintenance bills. Since then, an additional $239,234 has accrued in bills according to the summary provided by Petitioner. *See* Exhibit 80.

30. The Court finds that Mr. DeMauro's failure to provide marital support as ordered by this Court, to represent a deliberate and calculated effort by Joseph M. DeMauro to frustrate and impede Petitioner's efforts to conduct this and other cases against him, to require her to submit to divorce proceedings in the Dominican Republic, and to deprive her of her rights to an equitable division of marital property under RSA 458:16-a.

31. Petitioner provided unrebutted testimony that Respondent represented that he was earning 20-30% per year on their invested distributions. *See* Testimony of Anne DeMauro.

32. Petitioner provided information to a certified public accountant and investment advisor concerning both th [sic] net distributions from Saudi Arabia, and her compilations of the expenditures of the parties from 1976 to date. *See* Testimony of Anne DeMauro and Testimony of Mr. Ouellet.

33. A certified public accountant and investment advisor testified for Petitioner providing expert testimony showing the rates of returns earned by prudent investors

in the United States from 1976 to date. *See* Testimony of Mr. Ouellet.

34. In the absence of any information to the contrary from Respondent, and in the face of Petitioner's unrebutted testimony, the Court finds that Mr. Ouellet's chart showing a "blending" of investments 50% to "bonds" and 50% to "Standard and Poor's" index of stocks is a fair and reasonable approach in determining the most likely balances in the accounts which Respondent refuses to disclose to the Court. *See* Exhibit 83.

35. Although the Respondent's Counsel asked questions of Mr. Ouellet concerning the effect of different types of taxes upon the account balance, there was testimony that no taxes would be due on investments which had appreciated in value over the years until sold, and perhaps none paid at all if held in offshore "tax haven" jurisdictions. In any event, the Respondent who has possession of the funds and the information has not provided this Court with a scintilla of information that he may have disclosed to any taxing authority, domestic or foreign. Under such circumstances the Respondent cannot be heard to complain if a calculation is based upon the best data available to the Court. *See* Testimony of Mr. Ouellet.

36. Accordingly, the Court finds the "marital assets" subject to division under RSA 458:16-a to consist of the following:

A. A home in Florida at 1040 South Ocean Blvd., Manalapan with a fair market value of $4,000,000;

B. A home at 2595 Ocean Blvd., Rye Beach, New Hampshire with a fair market value of

$3,000,000 with contents valued at an additional $400,000;

C. A home in Tennessee with a market value of $150,000;

D. An account receivable from DeMauro Co., Inc. in the amount of $2.6 million;

E. Oil wells identified by the Court Appointed Receiver, known as the Coleman wells, and an interest in a corporation known as Vista Energy; and

F. Investment accounts now or formerly standing in the name of Redonia Foundation.

37. The Court finds that a home which had been purchased by the parties in Columbia, Maryland was sold by them on 8/27/87 for $365,000. The proceeds were turned over to Joan and Edward Martin for the purpose of constructing a home in Pelham, New Hampshire. Joseph DeMauro represented to Petitioner that the Pelham home would be held as was the Maryland home, in the names of both parties. Instead, the home is apparently in the names of Joan and Edward Martin. Likewise, a lot of land was purchased in Pelham, New Hampshire for $57,000 with marital assets, and placed into the names of Edward and Joan Martin. The Court finds that the Martins are straws with respect to the holding of these marital assets.

38. Given the history of this Respondent, and his repeated and deliberate failure to obey Court Orders, that it is highly likely that he will ignore any order of this Court to turn over to the Petitioner any assets of the marriage that the Court cannot directly transfer by its Order.

39. The equitable division of investment accounts, taking into account all factors presented at trial is $35,000,000 to Annette B. DeMauro, the balance to Joseph M. DeMauro. However, if, as, and when Petitioner is able to ascertain, based upon hard information, that the balance in the investment accounts exceeded as of the date of expert's report, that balance reported for the "blended" investment approach, she may apply to this Court for an increase in its order.

40. If Respondent fails to pay Petitioner $35,000,000, within thirty days of this Order, the Court finds that under the circumstances, full title to the marital residence in Florida and New Hampshire, and the home in Tennessee, must be awarded to the Petitioner and Respondent shall be credited with ½ of the values so found above for these properties minus the amount of any property taxes thereon.

43. There is ample evidence that Respondent has the ability to pay the court-ordered support and the property settlement including, but not limited to, the following:

A. the fact that Respondent retained four attorneys to represent him at the final hearing;

B. his ability to raise $503,684.00 within twenty-four hours in 1996 for bail;

C. the fact that Respondent paid Petitioner $20,000.00 per month in support, stopping only after the N.H. Supreme Court ruled in his favor on the Firfth [sic] Amendment; and

D. the testimony of Mr. Ouellet regarding the present value of the assets.

B. Defendant:

1. The parties were married in December 1979, in Palm Beach, Florida, a second marriage for both. They separated in 1991, and this action was filed in February of 1994.

2. There are no children of the marriage although each party has children of their prior marriages.

3. The Defendant provided for the full support, including college educations of the five children of both parties' marriages.

4. The Plaintiff testified that in 1976, the parties were virtually destitute and were forced to borrow substantial sums from Mr. Abdullah Schuwayer to be able to travel to Saudi Arabia. She denied any knowledge of the extent of the loans or when or how they were re-paid.

5. From 1976 to 1983, the Defendant was an employee of DeMauro Schuwayer Construction Company Ltd. working in Saudi Arabia.

8. In 1979, a home was purchased in Manalapan, Florida in the sole name of the Defendant. The title to the property was transferred to a Land Trust in 1985. Under the terms of the trust, the parties each have a 50% beneficial interest in the property.

9. In 1985, the Plaintiff claimed her 50% interest in the Manalapan realty had a value of $405,000. She claims before this Court that its value has increased five-fold in the intervening 14 years, notwithstanding that she also describes the property as derelict.

10. In 1987, the parties contributed funds to purchase a home for the Defendant's sister and brother in law.

The parties also purchased a home in Tennessee for the Plaintiff's parents to occupy.

17. The Plaintiff has provided affidavits and testified that she bases an undefined portion of her calculations of her husband's earnings from 1976-1983 on documents she last saw in 1991.

23. The Plaintiff conceded she allowed no reduction in the gross settlement amount she claimed was paid to her husband in 1991 for attorneys fees, costs of the litigation or tax consequences of the payments.

26. The receiver granted full authority to act in his behalf to Plaintiff's counsel, who, after diligent search throughout the United States and in Europe, located only oil wells of Vista Energy and Mesa Petroleum in which the Defendant had an interest.

28. On the state of the Plaintiff's own counsel's testimony under oath, and Plaintiff's own testimony based on remote and speculative hearsay, there is no credible evidence that Joseph DeMauro prevailed in any of the numerous lawsuits which the Plaintiff claims resulted in a single payment to the Defendant of $15,000,000.

28. [sic] The Plaintiff testified she relied on the above described documents and conversations to provide detailed financial information upon which her retained expert accountant (Ouellet) constructed a detailed series of projections of the Defendant's investment earnings for the years 1976-1999. (Summarized in Plaintiff's exhibits 81-84).

33. The Plaintiffs expert testified that if the income sources he utilized for his calculations were earned income,

then they were subject to marginal taxation rates in accordance with the following:

Years:	Rates:
1977-1981	$53,090 plus 70% of excess over $102,200
1982	$12,068 plus 50% of excess over $41,500
1983	$62,600 plus 50% of excess over $162,400

34. The Plaintiff provided Mr. Ouellet a compilation of "Withdrawal Details" upon which Mr. Ouellet based his projections of earnings and testified (Plaintiff's Exhibit #'s 81, 82, 83, 84, 85).

35. The Plaintiff told Mr. Ouellet that in 1979, the couple expended $1,000,000 on a home in Palm Beach, Florida. The actual value of the home in 1985 was $810,000 by the Plaintiff's own valuation set forth in Exhibit A to the Annette DeMauro Revocable Trust of 1985. (Plaintiff's Exhibit # 69).

39. The Plaintiff claims a need for $2500 per month for business entertaining although she has not been employed at any time since 1976.

40. The Plaintiff claims a need for $3500 per month for shoes and clothing to please a husband she has been separated from since 1991.

41. The Plaintiff claims a need for $2,000 per month for food and additional thousands of dollars monthly for the support of an enormous home, although she lives alone.